No. 08-866

IN THE
SUPREME COURT OF THE UNITED STATES

THE STATE OF NEVADA,
Petitioner,
v.
SHAWN RUSSELL HARTE,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE SUPREME COURT OF
THE STATE OF NEVADA

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED
(Capital Case)

1. Does the United States Constitution demand the conclusion that "it is unconstitutional to base an aggravating circumstance in a capital prosecution on a felony that was used to obtain first-degree murder conviction?"

2. Does the United States Constitution support the conclusion of the Nevada Supreme Court that prohibits "basing an aggravating circumstance on the predicate felony in a capital prosecution of a felony-murder?"

3. When evaluating the question of whether a statutory scheme genuinely narrows the class of murderers eligible for the death penalty, does the United States Constitution call for an objective or qualitative analysis or should the reviewing court determine whether the scheme "sufficiently" narrows the class?

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TO THE HONORABLE JUSTICES OF THE SUPREME COURT:

COMES NOW, the State of Nevada, by and through counsel, and petitions this Court for a Writ of Certiorari, and reversal of the Opinion of the Supreme Court of the State of Nevada.

OPINIONS AND JUDGMENTS BELOW

The Nevada Supreme Court opinion affirming the order of the trial court granting relief from a sentence of death, *Harte v. State*, 124 Nev. ___, 194 P.3d 1263 (2008) is set out in the appendix. In addition, the appendix includes prior decisions of the Nevada Supreme Court, *McConnell v. State*, 120 Nev. 1043, 102 P.3d 606 (2004), *rehearing denied*, 121 Nev. 25, 107 P.3d 1287 (2005). The *Harte* decision re-affirmed the more extensive ruling in *McConnell*. No review had been available for the *McConnell* decision because, while the Court announced a rule of law in that case, that defendant did not obtain relief. Thus, there was no justiciable controversy.

JURISDICTIONAL STATEMENT

The Nevada Supreme Court ruled that the Constitution of the United States, and *Lowenfield v. Phelps*, 484 U.S. 231, 108 S.Ct. 546 (1988) prohibits the state, in a capital murder prosecution, from obtaining a first-degree murder conviction in whole or in part upon a felony-murder theory and then using the same underlying felony as an aggravating circumstance that then allows consideration of the death penalty. That

procedure is allowed by statute but the Nevada Supreme Court ruled that the procedure was repugnant to the Constitution of the United States as construed in *Lowenfield v. Phelps, supra.* This Court has jurisdiction by 28 U.S.C. Section 1257.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

1. The Due Process Clause of the Fourteenth Amendment to the United States Constitution.

2. The Eighth Amendment to the United States Constitution

3. Nev. Rev. Stat. Section 200.030 (set out at length in the Appendix).

4. Nev. Rev. Stat. Section 200.033 (set out at length in the Appendix).

STATEMENT OF THE CASE

Shawn Harte and two confederates robbed and killed taxi driver John Castro. Harte and accomplice Weston Sirex rode in the back seat of the cab. In a relatively remote area of Washoe County, Nevada, while the taxi was slowly moving, Harte produced a handgun and shot Castro in the head. The pair then stole money from the cab, joined a third accomplice who had been following in a car and went off for dinner at Taco Bell. Castro died the following day.

Harte was charged with murder under two theories: that the murder was premeditated and

deliberate and; that the killing was committed during the course of a robbery. Both are prohibited by Nev. Rev. Stat. Section 200.030. The jury found Harte guilty but did not return a special verdict indicating which theory was applicable. Thereafter, the jury found one aggravating circumstance – that the murder was committed during a robbery and that Harte had killed the victim or knew that lethal force was to be applied. That aggravating circumstance, according to Nev. Rev. Stat. Section 200.033, allowed the jury to consider the death penalty. The jury sentenced Harte to death for the murder of Mr. Castro.

Harte appealed but the judgment and sentence were affirmed in *Harte v. State*, 116 Nev. 1054, 13 P.3d 420 (2000).

Harte's first round of state post-conviction proceedings netted no relief. Subsequently, the Nevada Supreme Court issued an opinion in *McConnell v. State*, 120 Nev. 1043, 102 P.3d 606 (2004), *rehearing denied*, 121 Nev. 25, 107 P.3d 1287 (2005). In that case, the Nevada Supreme Court quoted extensively from *Lowenfield v. Phelps*, 484 U.S. 231, 108 S.Ct. 546 (1988), and concluded that the Constitution precludes use of an underlying felony as both a rationale for a first-degree murder conviction and as an aggravating circumstance. The Court also ruled that the narrowing function of the statutory aggravating circumstance was too "slight" to pass constitutional muster. 120 Nev. at 1069.

The new rule announced in *McConnell* did not give rise to relief for that defendant. Because the decision was structured so as to avoid a justiciable controversy, no petition for review was appropriate.

Subsequently, the Nevada Supreme Court

announced that the new rule announced in *McConnell* would be applied retroactively. *Bejarano v. State*, 122 Nev. 1066, 146 P.3d 265 (2006). Again, there was no justiciable controversy because the defendant in that case obtained no relief.

Meanwhile, Shawn Harte was pursuing state post-conviction remedies. Once his second petition was before the trial court, the state of the law announced in *McConnell* and *Bejarano* was clear. The parties reached an agreement to narrow the issues and the trial court vacated the death sentence. The State then appealed that ruling to the Nevada Supreme Court in an effort to overturn the prior ruling in *McConnell*. The Nevada Supreme Court re-affirmed its holding and made it unmistakably clear that the ruling was based on this Court's ruling in *Lowenfield v. Phelps*, 484 U.S. 231, 108 S.Ct. 546 (1988). The Nevada Supreme Court affirmed the ruling that vacated the death penalty for the sole reason that the defendant had been charged with both premeditated murder and felony-murder, and the sole aggravating circumstance was based on that same felony-murder.

Now that there was finally a justiciable controversy, the State filed its petition for writ of certiorari.

REASONS FOR GRANTING THE WRIT

The Nevada Supreme Court has decided an important question of constitutional law in a way that conflicts with holdings of other state courts of last resort and of United States courts of appeals.

The Nevada Court had a few pertinent rulings. First, the Court ruled that where the indictment or

information includes a theory of first-degree murder by causing the death during robbery, arson, burglary, home invasion, or kidnapping, then unless the jury unanimously agrees to a special verdict denying any reliance on the felony-murder for its conviction of first-degree murder, the statute allowing the jury to consider the same underlying felony as an aggravating circumstance allowing for the death penalty, is unconstitutional, even with the additional element that the defendant personally killed or attempted to kill or knew that lethal force would be applied. That holding is contrary to *Lawrence v. Branker*, 517 F.3d 700 (4th Cir. 2008); *Scott v. Mitchell*, 209 F.3d 854 (6th Cir. 2000); *Deputy v. Taylor*, 19 F.3d 1485, 1497-98, 1500-02 (3d Cir.)(allowing double counting of felony-murder factor), *cert. denied*, 512 U.S. 1230, 114 S.Ct. 2730, 129 L.Ed.2d 853 (1994); *Johnson v. Dugger*, 932 F.2d 1360 (11th Cir.) (same), *cert. denied*, 502 U.S. 961, 112 S.Ct. 427, 116 L.Ed.2d 446 (1991); *Perry v. Lockhart*, 871 F.2d 1384, 1393 (8th Cir.)(allowing double-counting of felony-murder factor, and holding that *Lowenfield* overruled contrary holding in *Collins v. Lockhart*, 754 F.2d 258 (8th Cir.), *cert. denied*, 474 U.S. 1013, 106 S.Ct. 546, 88 L.Ed.2d 475 (1985)), *cert. denied*, 493 U.S. 959, 110 S.Ct. 378, 107 L.Ed.2d 363 (1989); *Byrne v. Butler*, 845 F.2d 501, 515 n.12 (5th Cir.)(allowing felony murder double-counting because of narrowing guilt-phase element that "offender has specific intent to kill or to inflict great bodily harm and is engaged in the perpetration ... of ... armed robbery, or simple robbery."), *cert. denied*, 487 U.S. 1242, 108 S.Ct. 2918, 101 L.Ed.2d 949 (1988); *Julius v. Johnson*, 840 F.2d 1533, 1540 (11th Cir.)(allowing double-counting of felony-murder factor), *cert. denied*, 488 U.S. 960, 109

S.Ct. 404, 102 L.Ed.2d 392 (1988).

In addition, several state courts of last resort have rejected the holding of the Nevada Court. *See State v. Fry*, 138 N.M. 700, 126 P.3d 516 (2005); *Thorson v. State*, 895 So.2d 85 (Miss. 2004); *Blanco v. State*, 706 So.2d 7 (Fla. 1997); *People v. Marshall*, 790 P.2d 676 (Cal. 1990); *Ferguson v. State*, 642 A.2d 772 (Del. 1994); *State v. Franklin*, 580 N.E.2d 1 (Ohio 1991).

The issue is significant in that the states that allow the death penalty commonly hold that a killing during an enumerated felony may amount to the highest degree of murder, and that the same underlying felony (plus personal involvement in the killing) tends to make the killer eligible for the death penalty. The Nevada Court outlawed such a statutory scheme, ostensibly on the authority of *Lowenfield v. Phelps*, 484 U.S. 231, 108 S.Ct. 546 (1988). This Court should grant certiorari to correct the notion (or announce) that such double-use of an underlying felony is prohibited by the Constitution.

The second ruling of the Nevada Supreme Court was that the Nevada statutory scheme does not "sufficiently narrow" the categories of murderers subject to the death penalty because so many murders involve robbery, arson, burglary, home invasion or kidnapping. 120 Nev. at 1065, 102 P.3d at 621. That is, the court seems to have held that the narrowing function must exclude a sufficient number of killers. This Court has rejected that analysis in *Arave v. Creech*, 507 U.S. 463, 113 S.Ct. 1534 (1993). Other courts of last resort have applied that decision to cases involving felony-murder as an aggravating circumstance and concluded that *many* murders involve

enumerated felonies, but not *every* murder involves such felonies and that, consequently, using commission of certain limited felonies, plus personal involvement in the killing, as an aggravating circumstance, is not prohibited by the Constitution. Those courts include *Steckel v. State*, 711 A.2d 5 (Del.Supr. 1998); *State v. Fry*, 126 P.3d 516 (N.M. 2005) and *State v. Tillman*, 750 P.2d 546, 571 (Utah 1987)(where aggravating circumstances is objective and does not apply to "all" murders, then it narrows the class.).

United States Courts of Appeals have also rejected the analysis that an aggravating circumstance must exclude a sufficient number of murderers and ruled that the aggravator need only be clear, objective and not universal. *See Bertolotti v. Dugger*, 883 F.2d 1503 (11th Cir. 1989); *United States v. Chandler*, 996 F.2d 1073 (11th Cir. 1993)(where aggravating circumstance "does not embrace anyone who committed murder, but only those who did so in connection with a continuing criminal enterprise" the aggravator serves the narrowing function); *Woratzeck v. Stewart*, 97 F.3d 329 (9th Cir. 1996)(noting that aggravator concerning motive of pecuniary gain does not necessarily apply to *all* who take property by force, the aggravator is not universal and thus serves the narrowing function).

The question ought not to be whether the aggravating circumstance occurs with some frequency, but whether the aggravating circumstance applies to all murders. Clearly not all murders involve robbery and so the aggravating circumstance does not include all killers and so it is not unconstitutional. Therefore, this Court ought to grant certiorari and then either reject or adopt the notion that an aggravating circumstance must serve to exclude some percentage of murderers

before it may be applied.

CONCLUSION

This Court ought to grant the writ of certiorari and reverse the decision of the Nevada Supreme Court.

Respectfully submitted.

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APPENDIX A

IN THE SUPREME COURT OF THE
STATE OF NEVADA

THE STATE OF NEVADA AND WARDEN, ELY STATE PRISON, E.K. MCDANIEL,
Appellants,
vs.
SHAWN RUSSELL HARTE,
Respondent.

No. 50161

Filed:
October 30, 2008

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Appeal from a district court order partially granting a post-conviction petition for a writ of habeas corpus in a death penalty case. Second Judicial District Court, Washoe County; Connie J. Steinheimer, Judge.

Affirmed.

Catherine Cortez Masto, Attorney General, Carson City; Richard A. Gammick, District Attorney, and Terrence P. McCarthy, Deputy District Attorney, Washoe County, for Appellants.

Scott W. Edwards, Reno; Thomas L. Qualls, Reno, for Respondent.

BEFORE THE COURT EN BANC.

OPINION

By the Court, MAUPIN, J.:

In this opinion, we consider the State's

contention that McConnell v. State[1] was wrongly decided and its alternative argument that a new trial is an appropriate remedy when the sole aggravating circumstance in a death penalty case has been determined to be invalid under McConnell during post-conviction review. We reject the State's contention that McConnell was wrongly decided, and we conclude that a new penalty hearing is the proper remedy under the circumstances described by the State.

FACTS

Respondent Shawn Russell Harte and two codefendants, Latisha Babb and Weston Sirex, murdered a Reno cab driver during the course of a robbery. Harte subsequently admitted to sheriff's deputies that he shot the cab driver in the head. The State alleged that Harte committed willful, premeditated, and deliberate murder or, alternatively, felony murder. The jury was not asked to return a special verdict form indicating upon which murder theory it relied. The jury found Harte guilty of first-degree murder with the use of a deadly weapon and robbery with the use of a deadly weapon.

During the penalty phase of the trial, the jury found only one aggravating circumstance: the murder was committed during the course of a robbery. Harte was sentenced to death. We affirmed the judgment of conviction.[2] Harte then filed a post-conviction petition for a writ of habeas corpus, which the district court

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[1]120 Nev. 1043, 102 P.3d 606 (2004) (holding that it is unconstitutional to base aggravating circumstance in capital prosecution on felony that was used to obtain first-degree murder conviction), rehearing denied, 121 Nev. 25, 107 P.3d 1287 (2005).

[2]Harte v. State, 116 Nev. 1054, 13 P.3d 420 (2000).

denied. On appeal, we dismissed Harte's appeal as untimely and denied his subsequent petitions for rehearing and en banc reconsideration.[3]

Harte filed a second post-conviction petition for a writ of habeas corpus in the district court. In addition to his claims of ineffective assistance of counsel, Harte alleged that pursuant to McConnell, the aggravating circumstance found by the jury was invalid because it was improperly based on the felony used to obtain the first-degree murder conviction. Harte later filed a supplement to his petition.

The State filed a response to the petition and a motion for an order regarding the scope of relief. In the motion, the State acknowledged that Harte may be entitled to relief pursuant to McConnell and Bejarano v. State[4] and that the appropriate remedy was a new trial rather than a new penalty hearing. Thereafter, Harte filed a notice in the district court that he was abandoning all claims that could result in a new trial and that his sole focus was obtaining a new penalty hearing.

The district court conducted a hearing on the State's motion and Harte's habeas petition and concluded that the appropriate remedy for a McConnell error was a new penalty hearing, not a new trial. The district court vacated the death sentence, affirmed the guilty verdict, and stayed further proceedings pending

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[3]Harte v. State, Docket No. 43877 (Order Dismissing Appeal, April 7, 2005); Harte v. State, Docket No. 43877 (Order Denying Rehearing, May 19, 2005); Harte v. State, Docket No. 43877 (Order Denying En Banc Reconsideration, September 8, 2005).

[4]122 Nev. 1066, 146 P.3d 265 (2006) (holding that rule announced in McConnell applies retroactively).

appellate review.[5] This appeal followed.

DISCUSSION

The State argues that McConnell was wrongly decided and should be reversed. Alternatively, the State argues that under the unique circumstances of this case, the district court erred by declaring that a new trial was not a permissible remedy.

McConnell was properly decided

The State contends that the district court's decision to partially grant Harte's second post-conviction petition for a writ of habeas corpus was erroneous because it was based on McConnell and McConnell was wrongly decided. The State specifically argues that McConnell should be revisited because it contains "three major flaws."

First, the State contends that our analysis in McConnell is flawed because it begins with the definition of first-degree murder instead of a "generic offense of felonious homicide,"[6] the common-law definition of murder, or even the notion of felonious murder. The State claims that if the McConnell court's analysis had started with the common-law definition of murder or the notion of a felonious homicide, the court would have recognized that Nevada's statutory scheme genuinely narrows the class of individuals that are

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[5]The district court also allowed Harte to withdraw his claims of error relating to the trial and dismissed his claims of error relating to the penalty hearing as moot.

[6]The State cites to Mullaney v. Wilbur, 421 U.S. 684, 688 (1975) (describing Maine's various levels of homicide).

eligible for the death penalty.[7]

In McConnell, we relied upon the analytical framework of Lowenfield v. Phelps[8] to determine the constitutionality of basing an aggravating circumstance on the predicate felony in a capital prosecution of a felony murder.[9] We noted that "a capital sentencing scheme 'must genuinely narrow the class of persons eligible for the death penalty and must reasonably justify the imposition of a more severe sentence on the defendant compared to others found guilty of murder'" to meet federal and state constitutional requirements.[10] We observed that this narrowing function may be accomplished by narrowly drawn definitions of capital offenses or through aggravating circumstances found by a jury during the penalty phase of a trial.[11] We evaluated Nevada's capital sentencing scheme as it applies to felony murder, determined that Nevada broadly defines capital felony murder, and concluded that the felony aggravating circumstance set forth in

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[7]To the extent that the State argues that McConnell should have been decided based on consideration of Nevada's entire capital sentencing scheme, we note that this issue was raised on rehearing in McConnell v. State, 121 Nev. 25, 107 P.3d 1287 (2005), where we held that "[t]he pertinent issue in this case is whether felony aggravators constitutionally narrow death eligibility in a felony murder, not whether the statutory scheme in the abstract can withstand a general constitutional challenge." Id. at 30-31, 107 P.3d at 1291.

[8]484 U.S. 231 (1988).

[9]120 Nev. 1043, 1063, 102 P.3d 606, 620 (2004).

[10]Id. at 1063, 102 P.3d at 620-21 (quoting Zant v. Stephens, 462 U.S. 862, 877 (1983)).

[11]Id. at 1064, 102 P.3d at 621 (quoting Lowenfield, 484 U.S. at 246).

NRS 200.033(4) did not genuinely narrow the class of felony murderers that are eligible for the death penalty.[12] Under these circumstances, the State has failed to demonstrate that our analysis in McConnell is flawed.

Second, the State contends that our analysis in McConnell is flawed because it is based on the question of whether the statutory aggravating circumstances "sufficiently" exclude an adequate number of murderers from the death penalty. The State claims that the proper question, as announced in Lowenfield, is whether the scheme "genuinely" narrows the class of murderers eligible for the death penalty. The State asserts that the term "genuine" calls for an objective determination of whether the statutory scheme narrows the class of murderers eligible for the death penalty.[13]

In McConnell, we began our discussion on aggravating circumstances by asking "in a case of felony murder does either of these two aggravators 'genuinely narrow the class of persons eligible for the death penalty and . . . reasonably justify the imposition of a more severe sentence on the defendant compared to others found guilty of murder?'"[14] In the analysis that followed, we determined that the felony and sexual-penetration aggravating circumstances reached all but four of the felonies contained in the felony-murder

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[12]Id. at 1066-69, 102 P.3d at 622-24.

[13]The State cites to Arave v. Creech, 507 U.S. 463 (1993) for the proposition that the legislature acts constitutionally if the aggravating circumstance does not apply to every murderer and if it is objective.

[14]McConnell, 120 Nev. at 1067, 102 P.3d at 623 (quoting Zant, 462 U.S. at 877) (emphasis added).

statute and that those four remaining felonies are less likely to involve death.[15] We further determined that the felony aggravating circumstance's intent element did "little more than state the minimum constitutional requirement to impose death for felony murder."[16] And we concluded that these aggravating circumstances may "theoretically" narrow the class of persons eligible for the death penalty, but they do not "genuinely" narrow that class, and therefore they do not meet constitutional muster.[17] Under these circumstances, the State has failed to demonstrate that we used the wrong constitutional standard for analyzing the narrowing function of Nevada's murder statutes.

Third, the State contends that the McConnell court's analysis is flawed because it discounted the requirement that the felony aggravating circumstance must be accompanied by certain mental states.[18] The State claims that Nevada's statutory scheme, by including an intent element with the felony aggravating circumstance, "has objectively excluded some first-degree murders from the death penalty."

In McConnell, we specifically addressed the felony aggravating circumstance intent element, noting

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[15]Id. at 1067, 102 P.3d at 623. The felony aggravator and the sexual-penetration aggravator do not reach sexual molestation of a child under the age of 14 years, child abuse, second-degree arson, and second-degree kidnapping. Id.

[16]Id.

[17]Id. at 1069, 102 P.3d at 624.

[18]See NRS 200.033(4) (providing that first-degree murder is aggravated when it was committed while person was engaged in an enumerated felony "and the person charged: (a) Killed or attempted to kill the person murdered; or (b) Knew or had reason to know that life would be taken or lethal force used").

that it (1) was different than the intent required for a felony-murder conviction, (2) largely mirrored the constitutional standard and did little to narrow the class of persons eligible for the death penalty, (3) lacked the specificity of the capital felony-murder definition that met the constitutional narrowing requirement in Lowenfield, and (4) could be overlooked and not considered by the jury.[19]

We also discussed the felony aggravating circumstance intent element on rehearing, stating that it

> "is narrower than felony murder, which in Nevada requires only the intent to commit the underlying felony. This notwithstanding, it is quite arguable that Nevada's felony murder aggravator, standing alone as a basis for seeking the death penalty, fails to genuinely narrow the death eligibility of felony murderers in Nevada."[20]

Under these circumstances, the State has failed to demonstrate that our consideration of the felony aggravating circumstance intent element was inadequate.

Having carefully considered the State's arguments, we decline to overrule McConnell or contravene the district court's application of its holding in this instance.

A new penalty hearing is the remedy under the

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[19]McConnell, 120 Nev. at 1067-68, 102 P.3d at 623-24.

[20]McConnell v. State, 121 Nev. 25, 28, 107 P.3d 1287, 1289 (2005) (quoting Leslie v. Warden, 118 Nev. 773, 785, 59 P.3d 440, 448-49 (2002) (Maupin, J. concurring)).

circumstances of this case

The State contends that the district court erred by concluding that the only remedy for a prejudicial McConnell error is a new penalty hearing. The State claims that this case is unique because there was only one aggravating circumstance and the State is willing to amend the charging document by removing the felony-murder theory. The State specifically argues that the McConnell error was a charging error and therefore a new trial is the appropriate remedy to restore the parties to status quo ante.

We reject the State's contention that a McConnell error constitutes a charging error. "The State may proceed on alternate theories of liability as long as there is evidence in support of those theories."[21] Here, the State exercised its discretion to charge Harte on alternative theories of murder. The State's exercise of discretion in this regard did not constitute a trial error. However, the State's decision to base an aggravating circumstance on the robbery that was also the basis for the felony-murder theory violated the rule in McConnell and resulted in a sentencing error. The State has offered no relevant authority or cogent bases upon which to conclude that striking a sole aggravating circumstance that violates McConnell mandates a new trial rather than a new penalty hearing.

As a general rule, when an aggravating circumstance is invalidated, a new penalty hearing is the appropriate remedy unless it is "clear beyond a reasonable doubt that absent the invalid aggravator[ ]

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[21]Walker v. State, 116 Nev. 670, 673, 6 P.3d 477, 479 (2000).

the jury still would have imposed a sentence of death."[22] The same analysis applies when an aggravating circumstance is invalidated under McConnell. Accordingly, we conclude that the district court did not err by striking the felony aggravating circumstance, determining that the error was prejudicial given that it was the only aggravating circumstance found by the jury, and concluding that the appropriate remedy was a new penalty hearing.[23]

CONCLUSION

For the reasons discussed above, we reject the State's contention that McConnell was wrongly decided and conclude that a new penalty hearing is the proper remedy in cases where the sole aggravating circumstance has been struck. We therefore affirm the district court's findings of fact, conclusions of law, and judgment.

s/Maupin, J.
Maupin

We concur:

s/Gibbons, C.J.
Gibbons

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[22]Bejarano v. State, 122 Nev. 1066, 1081, 146 P.3d 265, 275-76 (2006); see also Archanian v. State, 122 Nev. 1019, 1040, 145 P.3d 1008, 1023 (2006), cert. denied, ___ U.S. ___, 127 S. Ct. 3005 (2007); Browning v. State, 120 Nev. 347, 363-64, 91 P.3d 39, 51 (2004); State v. Bennett, 119 Nev. 589, 604-05, 81 P.3d 1, 11-12 (2003); Leslie, 118 Nev. at 782-83, 59 P.3d at 446-47.

[23]Without a comprehensive discussion of the analytics of McConnell, our concurring colleagues voice their concerns over this court's decision in that case. However, nothing in the concurrence either justifies retreat from McConnell or persuades us that the criminal justice system is less fair because of it.

s/Douglas _____, J.
Douglas

s/Cherry _____, J.
Cherry

HARDESTY, J., with whom PARRAGUIRRE and SAITTA, JJ., agree, concurring:

I concur with the majority that a new trial is not the proper remedy when the only aggravating circumstance found by the jury is invalidated under this court's decision in McConnell v. State.[1] And although I agree with the result reached by the majority, I write separately to express my belief that this case reveals three fundamental flaws in McConnell's analytical framework.

First, the Legislature has adopted a statutory scheme to narrow the class of persons eligible for the death penalty, and I see no basis for this court to go beyond the Legislature's construct for narrowing Nevada's death penalty scheme. In particular, the Legislature set forth in NRS 200.030(1) the types of murder that compose first-degree murder, for which a defendant may be eligible for the death penalty. To further narrow the class of persons eligible for the death penalty, NRS 200.033 details 15 aggravating circumstances, including that the murder was committed during the perpetration of certain enumerated felonies. The decision to allow the dual use of certain felonies as the basis for a finding of first-degree murder and as an aggravating circumstance rests with the Legislature, and the Legislature has spoken in this regard. Nothing in the Nevada Constitution or in Lowenfield v. Phelps,[2] upon which this court relied in McConnell, calls into question the Legislature's determination of aggravators to support

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[1]120 Nev. 1043, 102 P.3d 606 (2004).

[2]484 U.S. 231 (1988).

the death penalty. What the McConnell decision does is place this court in the position of performing the narrowing function when that function falls within the province of the Legislature. Moreover, the McConnell court supplanted the Legislature's narrowing prerogative without articulating any concrete standard for determining whether the Legislature has genuinely narrowed either in its definition of first-degree murder or in the aggravating circumstances that the jury may find at the penalty hearing.

Second, in my view, McConnell is flawed because, contrary to this court's conclusion, the Legislature has narrowly defined felony murder by limiting the felonies that subject a defendant to a first-degree murder conviction. These felonies of course involve crimes that are inherently dangerous. However, other inherently dangerous felonies—for example, felony DUI,[3] battery with substantial bodily harm with the use of a deadly weapon,[4] mayhem,[5] and assault with a deadly weapon[6]—are excluded from those contemplated by the first-degree felony-murder statute. Therefore, the premise upon which McConnell rests—that felony murder is broadly defined in Nevada—is false.

Third, this court's problematic conclusion that felony murder is broadly defined is further compounded by this court's use of Lowenfield as a springboard to impose an element of specific intent in the felony-

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[3]NRS 484.3792(1)(c).

[4]NRS 200.481(2)(e)(2).

[5]NRS 200.280.

[6]NRS 200.471(2)(b).

murder aggravator. In particular, this court's focus on the absence of a specific intent to kill in a felony-murder theory when addressing whether the felony-murder statute affords constitutional narrowing suggests that a specific intent to kill must accompany any aggravating circumstance even where intent has no bearing. Examples of such aggravating circumstances appear where the defendant has been convicted of another murder or felony involving the use or threat of force or committed the subject murder while under a sentence of imprisonment.[7] However, nothing in Lowenfield requires that specific intent be shown respecting any aggravator or that such a showing is required to satisfy the narrowing function required of a capital sentencing scheme. There is simply no constitutional, legislative, or jurisprudential basis to impose such a requirement for any aggravating circumstance.

In my view, McConnell does not limit the death penalty as the opinion purports, but rather functions to unnecessarily deprive the State of an aggravating circumstance when the State must use the act supporting it to prove a theory of murder. The legal underpinnings in McConnell will create problems not addressed by this court in that opinion when considering the issue of duality with other aggravating circumstances.

Despite my misgivings about McConnell, however, I do not advocate overruling that decision. The doctrine of stare decisis is an indispensable principle necessary to this court's jurisprudence and to the due administration of justice. That doctrine holds that "a

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[7]See NRS 200.033(1), (2).

question once deliberately examined and decided should be considered as settled."[8] As McConnell is firmly entrenched in this court's jurisprudence and has been relied upon in providing relief to defendants who have received death sentences, overruling that decision would be detrimental to the administration of justice. I write separately merely to express my intellectual disagreement with the analysis in McConnell, as I was not a member of this court when the case was decided.

s/Hardesty, J.
Hardesty

I concur:

s/Parraguirre, J.
Parraguirre

s/Saitta, J.
Saitta

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[8]Stocks v. Stocks, 64 Nev. 431, 438, 183 P.2d 617, 620 (1947) (citation omitted).

APPENDIX B

IN THE SUPREME COURT OF THE STATE OF NEVADA

ROBERT LEE MCCONNELL, Appellant,
vs.
THE STATE OF NEVADA, Respondent.

No. 42101

Filed: March 24, 2005

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This is an appeal from a judgment of conviction of first-degree murder, pursuant to a guilty plea, and from a sentence of death, pursuant to a jury verdict. Second Judicial District Court, Washoe County; Steven R. Kosach, Judge.

Affirmed.

Michael R. Specchio, Public Defender, and Cheryl D. Bond, Deputy Public Defender, Washoe County, for Appellant.

Brian Sandoval, Attorney General, Carson City; Richard A. Gammick, District Attorney, and Terrence P. McCarthy, Deputy District Attorney, Washoe County, for Respondent.

BEFORE THE COURT EN BANC.[1]

OPINION[2]

PER CURIAM:

This is an appeal from a judgment of conviction of first-degree murder, pursuant to a guilty plea, and

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[1]The Honorable Deborah A. Agosti, Justice, voluntarily recused herself from participation in the decision of this appeal.

[2] Pursuant to NRAP 34(f)(1) and SCR 250(6)(f), we have determined that oral argument is not warranted in this appeal.

from a sentence of death, pursuant to a jury verdict. Appellant Robert Lee McConnell shot Brian Pierce to death in August 2002. The State charged McConnell with murder and sought the death penalty. After his preliminary examination, McConnell was allowed to represent himself. He then pleaded guilty. He presented a case in mitigation at his penalty hearing, but the jury returned a sentence of death. Initially, he moved to waive his appeal but eventually authorized his appointed counsel to fully brief all issues on appeal.

McConnell challenges the propriety of his penalty hearing and death sentence on various grounds. The most significant question raised is: in a prosecution seeking death for a felony murder, does an aggravator based on the underlying felony constitutionally narrow death eligibility? We conclude that it does not, but because McConnell admitted to deliberate, premeditated murder, the State's alternative theory of felony murder was of no consequence and provides no ground for relief.

FACTS

On August 7, 2002, McConnell shot Brian Pierce to death. Pierce lived with and planned to marry April Robinson, McConnell's former girlfriend. McConnell broke into the couple's home while they were at work. When Pierce returned and entered his front door, McConnell shot him repeatedly. Later, when Robinson came home, McConnell threatened her with a knife, handcuffed her, and sexually assaulted her. He then kidnapped her, forcing her to drive to California. Robinson was able to escape and alerted authorities. McConnell was later arrested in San Francisco.

The State charged McConnell with first-degree murder, alleging theories of deliberate, premeditated murder and of felony murder during the perpetration of a burglary. The State also charged him with sexual assault and first-degree kidnapping. After the preliminary hearing, the State filed a Notice of Intent to Seek Death Penalty and alleged three aggravators: the murder was committed during the course of a burglary, was committed during the course of a robbery, and involved mutilation. Before trial, McConnell

successfully moved to represent himself; the Public Defender served as standby counsel thereafter. McConnell then pleaded guilty, without benefit of a plea agreement, to sexual assault and first-degree kidnapping; judgment was entered accordingly, and he was sentenced to consecutive terms of life imprisonment with the opportunity of parole. He also pleaded guilty to first-degree murder, and a penalty hearing before a jury was set.

McConnell's penalty hearing began on August 25, 2003, and lasted four days. In his opening statement, McConnell said that he believed that the evidence would show four mitigating circumstances: he was acting under extreme emotional distress at the time of the murder; he had accepted responsibility for the crimes by pleading guilty; he had no significant prior criminal history in the way of violent felonies; and his behavior in custody was good.

The evidence at the hearing showed that Robinson met McConnell in Reno in 2000, and the two began dating. She broke up with him in the spring of 2001 and about eight months later became engaged to Pierce. Threats were exchanged between the couple and McConnell, and Robinson obtained a temporary protective order against McConnell.[3] After breaking up with Robinson, McConnell told another girlfriend, Lisa Rose, that he was going to murder Pierce. Rose was so concerned that she twice notified the Secret Witness Program and also contacted Robinson. McConnell eventually left the Reno area.

About a year later, McConnell returned to the area. On August 4, 2002, he contacted his former roommate, Alejandro Monroy. When the two men met,

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[3] There was considerable discussion outside the presence of the jury as to whether the temporary protective order (TPO) would be admitted into evidence. Robinson mentioned the TPO during her direct examination. McConnell wanted to cross-examine her on the TPO, to show that she had violated its terms. The State objected, arguing that the TPO was irrelevant and potentially confusing. The district court agreed with the State and ruled that the TPO did not mitigate McConnell's actions and was not a proper subject of cross-examination.

Monroy noticed that McConnell was still fixated on Robinson and displayed aggression toward her. Monroy tried to persuade McConnell to let his feelings for Robinson go and to grow up.

Three days later, when Robinson came home from work at around 4:30 p.m., she noticed some unusual things. The window blinds were closed, a golf-ball-sized hole was in the outside paneling, and a blanket was lying in front of the door inside the house. Most unusual of all, however, was that her fiancé, Brian Pierce, did not come outside to greet her. A few seconds after entering her home, Robinson saw a man dressed in black holding a knife. It took her a moment to realize that the man was McConnell, whom she had not heard from in months.

McConnell told Robinson, "Just shut the fuck up." He grabbed her arm, forced her into the master bedroom, threw her facedown on the bed, and handcuffed her. He then placed her on a couch and began talking to her. About 20 minutes later, McConnell cut Robinson's shirt and bra off with the knife and took off her pants and panties. Placing her facedown on the bed again, he duct taped her arm to her leg, duct taped her eyes and mouth, and placed a towel over her head. He then sexually assaulted her vaginally, anally, and orally with his finger and penis.

Afterwards, McConnell asked Robinson for money, and she gave him seven dollars. Robinson then got dressed, and McConnell told her that if she made any wrong moves he was going to shoot her in front of her neighbors. She saw that he had a gun in a holster with two magazine clips and believed him. She also saw that he had a wallet and car keys that appeared to belong to Pierce. When she asked about Pierce, McConnell told her that Pierce was locked up in a U-Haul, being watched by other people. McConnell said that she would have to take him to California if Pierce was ever going to be set free.

Robinson and McConnell drove to California in her car. He told her that everything that was occurring was a part of his plan. She realized that McConnell "had been keeping track of . . . when Brian and I went

to work, when we got home, the activity at the house, our cars, where they were parked, how many dogs we had, where we sat in the house." As they approached San Francisco, Robinson began suspecting that Pierce was not a hostage and that McConnell was eventually going to kill her. After they stopped at a gas station, she was able to escape in the car. Robinson drove to a nearby hospital and contacted the police in San Mateo, California. She gave the police McConnell's backpack, which contained items such as a 9-millimeter semiautomatic handgun, bullet magazines, and handcuffs.

Early the next morning, on August 8, Washoe County Sheriff's Deputies responded to the reported kidnapping and sexual assault and arrived at Robinson's home. After kicking in the door and entering, the deputies found Pierce dead. He had suffered several gunshot wounds, and a knife was stuck in his torso. Underneath the knife was a videocassette entitled "Fear."

Dr. Christine Elliot, a forensic pathologist, performed an autopsy on Pierce's body. Pierce had suffered nine gunshot wounds. One gunshot wound behind his ear "appeared to be very close range or contact in nature." He had also suffered three stab wounds. Two stab wounds were the "most superficial," and a knife was still in the third wound. The lack of bleeding into the stab wounds suggested that they occurred postmortem. Pierce died from massive blood loss from the gunshot wounds.

Before his arrest, McConnell called his brother, Darren Bakondi, and asked him to send "money, things of that nature." Bakondi testified that McConnell was "kind of rambling" during the conversation: "He told me maybe he should kill himself. Or he said he might go out in a blaze of glory, maybe make the cops–maybe take a couple of them with him, or hopefully some kind of shootout or something."

Less than a week after the crimes, McConnell was arrested in San Francisco. He was extradited back to Nevada. While in custody, he made a number of drawings, had some recorded telephone conversations,

and wrote a number of letters. These items were admitted as evidence against him. One item was a letter he wrote to Robinson after she testified at his preliminary hearing. The letter had a cover sheet with "Rest in peace" and "1977-2002" (the years of Pierce's birth and death) written on it. The letter read in part:

> I hope this letter finds you before you kill yourself. Just think. Now you can be with your mom and Brian forever. That was some performance last Thursday. You almost had me feeling sorry for you.
>
> You should thank me, you know. I could get into your house anytime I wanted. Just think. Brian would still be alive if you had locked that window. How does that really make you feel, April? Late at night, alone, when you cry yourself to sleep. Yes, it is a nightmare. And it won't end until you finish the job on your arm.

The last sentence referred to an earlier attempt by Robinson to commit suicide. She, however, never received the letter. (Other items admitted into evidence will be discussed below.)

At the time of his murder, Pierce was 26 years old, attending college and studying graphic design. His younger sister, Kristine Pierce, testified that he had many friends. She loved him and looked to him for guidance. She described Pierce as "a brave person and a real man." Pierce's mother, Pam McCoy, spoke of her pride for her only son and stated, "He never spoke hurtful words. He was loyal. He was a loving son."

Pierce's stepmother, Sheryl Pierce, described Pierce as "a great kid" who held a Bible study class in his bedroom every week while growing up. She thought of him every day. Mrs. Pierce also described two telephone calls she received one night at home after the murder. In the first call, when she heard McConnell say his name on her answering machine, she broke the connection. McConnell called back about a minute later and said on her machine, "Your son died like a coward." Mrs. Pierce was "absolutely horrified" and "couldn't imagine why anyone would be so cruel and mean as to

call someone he doesn't even know just to cause that kind of pain."

McConnell called three witnesses. His longtime best friend, Luis Vasquez, who managed a Reno car dealership, described McConnell as one of the best car salesmen he ever had. Vasquez took family vacations with McConnell and trusted him to baby-sit his children. Before the crimes, Vasquez told McConnell to "walk away" from his feelings for Robinson. He described McConnell as being "very, very depressed," and added that McConnell was crying and, at times, suicidal.

Misty Tackman, a receptionist at the car dealership where McConnell had worked, testified that Robinson once cursed at her and threatened to kill her with a knife.

Cassandra Gunther, the mother of McConnell's daughter, I testified that she became pregnant in 1999 when she was 19 years old. McConnell pressured her into keeping the child, once threatening her life. Gunther ended the relationship, the child was born, and Gunther married another man. As Gunther wanted, McConnell had nothing to do with his daughter after the birth.

McConnell testified on his own behalf. He declined to give specific details about his childhood but stated that he and his mother did not get along. He said that he did not want to make excuses for his behavior because many people have bad experiences growing up. He added, "Everything I'm saying now is for the benefit of the Robinson and Pierce family." McConnell testified that initially his relationship with Robinson was great, but after he caught her cheating, things went downhill. She started spending time with Pierce, and McConnell began to get jealous and perceive Pierce as a threat. Threats between McConnell and Pierce were made "back and forth," but Pierce "wouldn't fight."

McConnell stated:

> I attempted to leave town, get away, because there was an instant where I was-I'm going to do something right now. I'm going to kill these people right now....

. . . .

I should have got the counseling maybe to deal with some other issues. I never did.

And, you know, at some point I just–I don't want to say snap. It wasn't instantaneous, you know. I came back with a plan to murder. I did. When I crossed country, I came back, this is about revenge. I'm going to get these people, Brian, April. . . . And in my mind the war is on. The words have been said. The threats on both sides. So I am justified in whatever I do because, you know, they shouldn't have messed with me; they shouldn't have talked shit to me.

And but then there was the other side where, you know, what the hell are you doing? And I would go back and forth....

. . . .

At some point on August 7th I did all the things they said. . . . You know, I was just kind of aimless, wandering around. But all of a sudden I became focused, and I did, and I just made the decision I'm going to do this. I'm going to retaliate against the people that ruined my life.

McConnell also said that

I can't believe that I killed a Christian. . . . And to find out that I took the life of a person that goes to church and all this stuff that I find out, it hurts me now.

At the time, yeah, very lack of remorse. I was pissed off. I admit to making those phone calls, the drawings on the wall. That was done absolutely, you know, on purpose....

. . . .

> But in-with respect to this murder, . . . I'm the coward. I ambushed Brian. He had no chance. Because of perceived threats or whatever, whatever I told myself for justification, you know, I took his life. You know, there's no excuse for that. And I have to answer to everybody.

He added, "I am sorry for what I did now. I really am."

Under cross-examination, McConnell described Pierce's murder on August 7. He had been watching Robinson's and Pierce's house with binoculars for two days before the murder. The morning of the murder, wearing a police-issue battle dress uniform, he broke into the house through an open window and took such things as bills, pictures, and notes to see what Robinson and Pierce had been doing.

McConnell reentered the home at around 12:20 p.m. and waited, determined to kill Pierce when he came home. Once Pierce came in the door, McConnell pointed his gun at him and said, "Give me your wallet." Pierce threw his wallet toward McConnell and reached for the door. McConnell fired his gun ten times. He approached Pierce because he wanted to look into his eyes to see him die. He then dragged Pierce's body into a bedroom and cut into it two or three times to dig out a "Black Talon" bullet to see what one looked like inside a body. McConnell then stuck a knife into Pierce's torso because he was "still mad." He placed the videotape "Fear" that he found at the house on the body as a message for Robinson. He also took credit cards out of Pierce's wallet.

McConnell explained that his actions were the result of emotional duress. Because this duress continued even after he was in custody, he boasted of murdering Pierce and took pleasure in making Pierce's family suffer. McConnell said he had since had a change of heart, but he also admitted that violence was still in his nature.

The Jury found all three aggravating circumstances, determined that any mitigating circumstances were insufficient to outweigh the aggravating circumstances, and returned a verdict of

death.

DISCUSSION

The constitutionality of Nevada's use of lethal injection

McConnell contends that Nevada's use of lethal injection as the method of execution is unconstitutional. Due to the absence of detailed codified guidelines setting forth a protocol for lethal injection, he argues that Nevada has failed to ensure that executions are not cruel and unusual punishment prohibited by the United States Constitution. Without codified guidelines, he argues, there is the potential for either accidentally "botched" executions or intentional abuse by Department of Corrections officials who could gratuitously inflict pain during the execution procedure. We are not persuaded by these arguments.

Nevada executed prisoners by means of lethal gas until 1983, when the Legislature changed the authorized method of execution to lethal injection.[4] NRS 176.355(1) provides that a sentence of death in Nevada "must be inflicted by an injection of a lethal drug." NRS 176.355(2)(b) requires the Director of the Department of Corrections to "[s]elect the drug or combination of drugs to be used for the execution after consulting with the State Health Officer."[5] "[S]tatutes are presumed valid, and the burden is on the person challenging the statute to prove it is unconstitutional" through "a 'clear showing of invalidity.'"[6]

McConnell cites no authority from this or any other jurisdiction that deems lethal injection

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[4] See 1983 Nev. Stat., ch. 601, § 1, at 1937.

[5] See also NRS 453.377(6) (providing that otherwise controlled substances may be legally released by a pharmacy to the Director of the Department of Corrections for use in an execution); NRS 454.221(2)(f).

[6] Castillo v. State, 110 Nev. 535, 546, 874 P.2d 1252, 1259 (1994)(quoting Sheriff v. Martin, 99 Nev. 336, 340, 662 P.2d 634, 637 (1983), disapproved on other grounds by Wood v. State, 111 Nev. 428, 430, 892 P.2d 944, 946 (1995).

unconstitutional as a matter of law because of the absence of detailed codified guidelines for the procedure. He cites a single law review article criticizing lethal injection,[7] but provides no specific facts or allegations indicating that executions in Nevada have either accidentally or intentionally been administered in a cruel or unusual manner. Rather, McConnell's argument largely consists of speculative accusations, and he cites no part of the record where he challenged the constitutionality of lethal injection before the district court.[8] McConnell's claim raises fact-intensive issues which require consideration by a fact-finding tribunal and are not properly before this court in the first instance.[9]

To the extent that McConnell argues that the statutes mandating lethal injection are unconstitutional on their face, we reject that argument. More than 80 years ago in State v. Jon,[10] this court rejected an almost identical claim challenging execution by lethal gas. In Jon, the appellants challenged their execution by lethal gas on the basis that Nevada's statute authorizing execution[11] by lethal gas was "indefinite and uncertain as to the formula to be employed" and therefore constituted cruel and unusual

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[7] See Deborah W. Denno, When Legislatures Delegate Death: The Troubling Paradox Behind State Uses of Electrocution and Lethal Injection and What It Says About Us, 63 Ohio St. L.J. 63, 141, 185, 228 (2002).

[8] See Leonard v. State, 117 Nev. 53, 63, 17 P.3d 397, 403 (2001)("Generally, failure to object will preclude appellate review of an issue.").

[9] See NRS 177.025 ("The appeal to the Supreme Court from the district court can be taken on questions of law alone.").

[10] 46Nev. 418, 211 P. 676 (1923).

[11] The statute was the predecessor to Nevada's current lethal injection statute, NRS 176.355, and contained similar language. See 1921 Nev. Stat., ch. 246, § 431, at 387.

punishment.[12] The appellants contended that this court "must take judicial notice of facts and conclusions reached as the result of scientific research, and . . . declare that the law in question provides a cruel and inhuman method of enforcing the death penalty."[13]

This court rejected the appellants' argument:

> It is true that the [death] penalty has been inflicted in different ways; for instance, by hanging, by shooting, and by electrocution; but in each case the method used has been to accomplish the same end-the death of the guilty party. Our statute inflicts no new punishment; it is the same old punishment, inflicted in a different manner, and we think it safe to say that in whatever way the death penalty is inflicted it must of necessity be more or less cruel.
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> But we are not prepared to say that the infliction of the death penalty by the administration of lethal gas would of itself subject the victim to either pain or torture. . . .
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> . . . We must presume that the officials intrusted with the infliction of the death penalty by the use of gas will administer a gas which will produce no such results, and will carefully avoid inflicting cruel punishment. That they may not do so is no argument against the law.
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> . . . The legislature has determined that the infliction of the death penalty by the administration of lethal gas is humane, and it would indeed be not only

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[12] Jon, 46 Nev. at 435, 211 P. at 681.

[13] Id. at 436, 211 P. at 681.

> presumptuous, but boldness on our part, to substitute our judgment for theirs. . . .
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> . . . The present statute provides that the judgment of death shall be inflicted by the administration of lethal gas, and that a suitable and efficient inclosure and proper means for the administration of such gas for the purpose shall be provided. We cannot see that any useful purpose would be served by requiring greater detail.[14]

The reasoning in Jon remains sound and applies to McConnell's claim. We therefore deny McConnell relief on this issue.

The admission of character evidence during the penalty hearing

McConnell contends that the district court improperly admitted several pieces of "bad act" evidence against him during the penalty hearing. He calls the evidence irrelevant, inflammatory, and more prejudicial than probative. He also contends that the evidence was improper because it did not prove any aggravating circumstance. We conclude that the evidence was properly admitted.

"The decision to admit particular evidence during the penalty phase is within the sound discretion of the district court and will not be disturbed absent an abuse of that discretion."[15] Evidence that does not prove an aggravating circumstance is still admissible if it relates to the offense, the defendant, or the victim and its probative value is not substantially outweighed by the

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[14] Id. at 436-38,211 P. at 681-82.

[15] McKenna v. State, 114 Nev. 1044, 1051, 968 P.2d 739, 744 (1998).

danger of unfair prejudice.[16] The jury must be instructed that such evidence is "other matter evidence" which cannot be considered initially in determining whether the defendant is death eligible but only, after that determination is made, in deciding the appropriate sentence.[17]

The evidence that McConnell challenges falls into three categories: photographs of drawings he made and taped to his prison cell wall, recordings of telephone conversations he had with his father and a former roommate, and portions of a letter he wrote to another inmate.

McConnell had several drawings hanging in his cell, and photographs of these drawings were admitted into evidence. These drawings included a picture of a man (apparently the victim, Pierce) with his face crossed out and the phrases "Fuckin' coward" and "See you in hell, faggot" written on it. Another drawing depicted a "Black Talon" bullet entering Pierce's head. McConnell unsuccessfully objected to their admission into evidence.

Two audiotape recordings contained portions of conversations McConnell had while in custody: one with his father, the other with his former roommate. McConnell said, among other things, "I was going to cut his [Pierce's] head off," "I got him ten times before he could even hit the ground," and "I'll just kill people from here on out." McConnell apparently boasted of his satisfaction in committing the crimes and his intent to control the criminal justice system. McConnell also objected unsuccessfully to admission of the recordings.

A letter McConnell wrote while he was in prison to another inmate was admitted into evidence. During redirect examination of April Robinson, the prosecutor

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[16] Hollaway v. State, 116 Nev. 732, 746, 6 P.3d 987, 997 (2000); McKenna, 114 Nev. at 1051-52, 968 P.2d at 744; NRS 48.035(1).

[17] See Hollaway, 116 Nev. at 746, 6 P.3d at 996-97; Byford v. State, 116 Nev. 215, 238-39, 994 P.2d 700, 715-16 (2000); NRS 175.552(3).

read the following portion of the letter: "So don't patronize me or try to coerce, bribe or threaten to testify against me. You wanna get out—I don't. I could care less about anything else that I'm charged with. I enjoy my [victim's] pain and suffering. It makes my job worth it that much more." The prosecutor asked Robinson, "Is that more the defendant you know?" She replied, "Yes." McConnell did not object that the letter was unfairly prejudicial; therefore, he must establish that any error in admitting it was plain and affected his substantial rights, i.e., was prejudicial.[18] We see no error in regard to any of the evidence.

The drawings, recordings, and letter concerned McConnell's attitude toward his victims. They were relevant and probative of his cruel and violent character and lack of remorse. Although this evidence was obviously prejudicial, it was not unfairly so because of its probative value. The jury could properly consider the items as "other matter evidence" of McConnell's character in considering whether to sentence him to death. And the jury was instructed correctly under Evans v. State[19] regarding the proper use of evidence presented at a capital penalty hearing. (Instruction no. 20.) The evidence was also relevant, at least in part, to rebut McConnell's evidence of mitigation–his assertion that he felt remorse for the victims. Therefore, McConnell has failed to show that the district court abused its discretion by admitting the evidence.

Claims of prosecutorial misconduct

McConnell contends that he was denied a fair penalty hearing because of prosecutorial misconduct. He claims that the State made several improper remarks to the jury that exacerbated the prejudicial nature of evidence admitted against him. We find no

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[18] See NRS 178.602 ("Plain errors or defects affecting substantial rights may be noticed although they were not brought to the attention of the court."); Gallego v. State, 117 Nev. 348, 365,23 P.3d 227,239 (2001).

[19] 117 Nev. 609, 635-36, 28 P.3d 498, 516-17 (2001).

merit in this claim.

"To determine if prejudicial prosecutorial misconduct occurred, the relevant inquiry is whether a prosecutor's statements so infected the proceedings with unfairness as to make the results a denial of due process."[20] This court will not lightly reverse a criminal conviction "'on the basis of a prosecutor's comments standing alone.'"[21]

When McConnell moved to exclude the evidence of his drawings and phone calls, he argued that the evidence was overly prejudicial and was "just going to piss off the jury." The prosecutor responded that "everything I—or we present during this penalty phase will be, to quote Mr. McConnell, to piss off this jury." The prosecutor also stated that the evidence was probative as well as prejudicial and "we're going to try to prejudice him with this jury." These remarks, McConnell argues, prove that prosecutorial misconduct occurred, and he repeatedly underscores his other contentions of misconduct by referring to these remarks. But the essential objective of the prosecution during a penalty hearing is to convince jurors that the defendant deserves to be sentenced to death.[22] This objective is obviously "prejudicial" to the defendant, but the State's tactics must not be unfairly prejudicial. Here, even though the prosecutor was responding to and employing McConnell's own words, the language was unnecessary and unsuitable for the courtroom. However, the remarks occurred outside the presence of the jury and did not betray an improper motive or tactic. We conclude that they were not misconduct and did not prejudice McConnell.

McConnell next contends that the State committed misconduct when it remarked on and

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[20] Thomas v. State, 120 Nev. 37, 47, 83 P.3d 818, 825 (2004).

[21] Hernandez v. State, 118 Nev. 513, 525, 50 P.3d 1100, 1108 (2002)(quoting United States v. Young, 470 U.S. 1, 11 (1985).

[22] See Jones v. State, 113 Nev. 454, 468, 937 P.2d 55, 64 (1997).

emphasized his lack of remorse. However, he failed to object on this ground. Therefore, to warrant relief from this court, he must establish that the error was plain and affected his substantial rights.[23] He fails to show any error. McConnell relies on Brake v. State, where this court held that the district court violated a defendant's Fifth Amendment right against self-incrimination by considering the defendant's lack of remorse in its sentencing decision.[24] In Brake, however, the defendant maintained his innocence.[25] Here, McConnell pleaded guilty and professed remorse. The State did not rely on any silence on his part to argue lack of remorse; rather, it pointed to McConnell's actions and statements after the murder. Consideration of this issue in the penalty phase did not implicate his Fifth Amendment right against self-incrimination.

Next, McConnell contends that the State committed misconduct by asking him on cross-examination if he had acted "like a terrorist." He also complains that the State improperly asked his brother if McConnell said, "Leave it to a wop to bring a knife to a gunfight."[26] His brother conceded that McConnell made the statement. McConnell objected to neither question, and there was no plain error in either instance.[27] He also did not object to a remark referring to his "legacies of tragedy" or to evidence and argument regarding a handcuff key he possessed after his arrest,

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[23] See NRS 178.602; Gallego, 117 Nev. at 365, 23 P.3d at 239.

[24] 113 Nev. 579, 584-85, 939 P.2d 1029, 1032-33 (1997); U.S. Const. amend. V.

[25] 113 Nev. at 584-85, 939 P.2d at 1032-33. McConnell also cites Mitchell v. United States, 526 U.S. 314 (1999), but it is no more apposite to his case than is Brake. Moreover, the Court in Mitchell "express[ed] no view" on "[w]hether silence bears upon the determination of a lack of remorse." 526 U.S. at 330.

[26] This was apparently a quote from dialog in the movie The Untouchables.

[27] See NRS 178.602; Gallego, 117 Nev. at 365, 23 P.3d at 239.

and we discern no misconduct.

The proper scope of the testimony of the sexual assault victim and victim impact testimony regarding special occasions

McConnell contends that April Robinson improperly testified about the details of her sexual assault and kidnapping. He maintains that this testimony, regarding crimes to which he had already pleaded guilty, was irrelevant in his penalty hearing for the murder of Pierce. He further contends that the testimony violated the position the State took during a pretrial hearing when the prosecutor stated that Robinson was "not going to testify about the sexual assault." Robinson did testify in detail about her sexual assault and kidnapping. However, the State clarified its position later in the pretrial hearing and expanded the anticipated scope of Robinson's testimony. But regardless of the State's pretrial representations, McConnell did not object to the testimony and therefore waived the issue for appellate review absent a showing of plain error.[28] He fails to show any error.

The State argued and the evidence showed that McConnell killed Pierce out of jealously and revenge because he was Robinson's fiancé. McConnell's sexual assault and kidnapping of Robinson almost immediately after the murder were sufficiently connected to Pierce's murder to be both relevant and more probative of McConnell's character and motives for the murder than unfairly prejudicial. Therefore, Robinson's testimony was admissible "other matter" evidence.[29]

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[28] Id.

[29] Robinson apparently had a criminal conviction, and McConnell filed a subpoena duces tecum to obtain her presentence report. The district court granted the State's motion to quash the subpoena. McConnell maintains this was unfair but does not raise it as a distinct issue. He suggests that Robinson may have accused him of violent behavior to help herself in her own case, but his own testimony did not contradict Robinson's basic description of the crimes.

McConnell also contends that the penalty hearing was rendered fundamentally unfair because victim impact testimony referred to such events as birthdays, holidays, and the anticipated wedding of Robinson and Pierce. McConnell acknowledges that the State itself did not make these remarks but contends that the State improperly coaxed the victims into doing so. This argument is meritless.

"This court has repeatedly held that so-called 'holiday' arguments are inappropriate . . . [because they] 'have no purpose other than to arouse the jurors' emotions.'"[30] McConnell cites to five instances where Pierce's stepmother and mother testified about special occasions such as birthdays, holidays, and the anticipated wedding. He must demonstrate plain error because he did not object to any of this testimony.[31] He fails to demonstrate any error. Nothing in the questioning supports his contention that the State coaxed unfairly prejudicial responses from the victims. Rather, the victim impact testimony was appropriate and within its permissible bounds.

The failure to bifurcate the penalty hearing

McConnell argues that the penalty hearing should have been bifurcated. We have rejected this argument before, most recently in Johnson v. State.[32] McConnell asserts that Johnson did not consider the United States Supreme Court's relatively recent decision in Ring v. Arizona.[33] In Johnson, we did consider Ring's impact on Nevada's capital sentencing

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[30] Quillen v. State, 112 Nev. 1369, 1382, 929 P.2d 893, 901 (1996)(quoting Williams v. State, 103 Nev. 106, 109, 734 P.2d 700, 702 (1987)).

[31] See NRS 178.602; Gallego, 117 Nev. at 365, 23 P.3d at 239.

[32] 118 Nev. 787, 806, 59 P.3d 450, 462 (2002).

[33] 536 U.S. 584 (2002); see also Apprendi v. New Jersey, 530 U.S. 466 (2000).

scheme.[34] Though we did not apply Ring to the bifurcation issue, McConnell fails to explain how it has any such application. Additionally, as previously discussed, the jury in this case received an appropriate instruction on the use of the evidence admitted during the penalty hearing. We presume that juries follow the instructions they are given,[35] and McConnell has not demonstrated otherwise in his case.

Basing an aggravating circumstance on the predicate felony in a capital prosecution of a felony murder

McConnell argues that the aggravating circumstance based on burglary failed to perform its constitutional function of narrowing death eligibility because the burglary also served as an element of felony murder. The State failed to respond to this argument.[36] We conclude that the argument has merit.

In charging McConnell with first-degree murder, the State alleged two theories: deliberate, premeditated murder and felony murder during the perpetration of a burglary. McConnell was advised of both theories when he pleaded guilty. During his testimony, McConnell admitted that he had premeditated the murder: "Nothing justifies cold-blooded, premeditated, first-degree murder, which is what I did." His other testimony and the evidence as a whole overwhelmingly supported this admission. McConnell's conviction for first-degree murder is therefore soundly based on a theory of deliberate, premeditated murder. Consequently, our ensuing analysis and decision do not invalidate the use of the felony aggravating circumstances in this case.

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[34] 118 Nev. at 799-804, 59 P.3d at 458-61.

[35] See Collman v. State, 116 Nev. 687, 722, 7 P.3d 426, 448 (2000).

[36] The State's failure to address this issue contributed to our decision not to conduct oral argument in this case. We also note that this is a recurring issue that has long confronted this court, as the following discussion demonstrates.

This court first addressed the contention that in a felony-murder prosecution the underlying felony cannot be considered as an aggravating circumstance in Petrocelli v. State in 1985.[37] Petrocelli rejected that contention primarily because "the U.S. Supreme Court has implicitly approved the use of the underlying felony in felony murder cases as a valid aggravating circumstance to support the imposition of the death sentence," though neither Supreme Court opinion cited addressed the issue.[38] We have followed Petrocelli's rationale since.[39] But we have never addressed the 1988 Supreme Court case Lowenfield v. Phelps,[40] which dealt with a challenge to a death sentence on the basis that the sole aggravating circumstance was identical to an element of the capital murder.[41] We conclude that Lowenfield provides the basic analytic framework to approach this issue.[42]

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[37] 101 Nev. 46, 692 P.2d 503 (1985), holding modified on other grounds by Sonner v. State, 114 Nev. 321, 327, 955 P.2d 673, 677 (1998).

[38] Id. at 53, 692 P.2d at 509 (emphasis added) (citing Proffitt v. Florida, 428 U.S. 242 (1976); Gregg v. Georgia, 428 U.S. 153 (1976)(plurality opinion)).

[39] See, e.g., Atkins v. State, 112 Nev. 1122, 1134, 923 P.2d 1119, 1127 (1996).

[40] 484 U.S. 231, 241-46 (1988).

[41] See Leslie v. Warden, 118 Nev. 773, 784-86, 59 P.3d 440, 448-49 (2002) (Maupin, J., concurring) (discussing Lowenfield and this issue).

[42] A number of other courts have considered this issue since Lowenfield was decided. Opinions determining that use of the felony in a felony murder as an aggravator was proper include: Deputy v. Taylor, 19 F.3d 1485, 1500-02 (3d Cir. 1994); Perry v. Lockhart, 871 F.2d 1384, 1392-93 (8th Cir. 1989); and Ferguson v. State, 642 A.2d 772, 780-81 (Del. 1994). Opinions determining that such use was not proper include: State v. Middlebrooks, 840 S.W.2d 317, 341-47 (Tenn. 1992), superseded by statute as stated in State v. Stout, 46 S.W.3d 689, 705-06 (Tenn. 2001); and Engberg v. Meyer, 820 P.2d 70, 86-92 (Wyo. 1991).

The Eighth Amendment prohibits the infliction of cruel and unusual punishments.[43] In 1972, the Supreme Court held that capital sentencing schemes which do not adequately guide the sentencers' discretion and thus permit the arbitrary and capricious imposition of the death penalty violate the Eighth and Fourteenth Amendments.[44] As a result, the Court has held that to be constitutional a capital sentencing scheme "must genuinely narrow the class of persons eligible for the death penalty and must reasonably justify the imposition of a more severe sentence on the defendant compared to others found guilty of murder."[45] We conclude that Nevada's own constitutional bans against the infliction of "cruel or unusual punishments" and the deprivation of life "without due process of law" require this same narrowing process.[46]

The Court applied this tenet to Louisiana's capital punishment scheme in Lowenfield.[47] Although Lowenfield did not specifically address felony murder, it considered a case where the only aggravating circumstance found by the jury was identical to an element of the capital crime.[48] The jury convicted Lowenfield of first-degree murder for killing a human being when "the offender has specific intent to kill or to inflict great bodily harm upon more than one person;" the jury then found a single aggravating circumstance

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[43] U.S. Const. amend. VIII.

[44] Gregg, 428 U.S. at 200, 206-07 (plurality opinion) (summarizing Furman v. Georgia, 408 U.S. 238 (1972)); id; at 220-21 (White, J., concurring) (same). The Eighth Amendment applies to the states through the Fourteenth Amendment's Due Process Clause. Robinson v. California, 370 U.S. 660, 666 (1962); U.S. Const. amend. XIV, § 1.

[45] Zant v. Stephens, 462 U.S. 862, 877 (1983).

[46] Nev. Const. art. 1, §§ 6, 8(5).

[47] 484 U.S. at 244.

[48] Id. at 241.

that "the offender knowingly created a risk of death or great bodily harm to more than one person" and returned a verdict of death.[49]

The Supreme Court concluded that the narrowing function required by the Constitution had been accomplished.[50] The Court explained that

> the narrowing function required for a regime of capital punishment may be provided in either of these two ways: The legislature may itself narrow the definition of capital offenses, as Texas and Louisiana have done, so that the jury finding of guilt responds to this concern, or the legislature may more broadly define capital offenses and provide for narrowing by jury findings of aggravating circumstances at the penalty phase.[51]

The Louisiana statute established five grades of homicide, and death was a possible punishment only for first-degree murder, which comprised five categories.[52] The Court concluded that the statute "narrowly defined the categories of murders for which a death sentence could be imposed."[53]

Thus,

> the "narrowing function" was performed by the jury at the guilt phase when it found defendant guilty of three counts of murder under the provision that "the offender has a specific intent to kill or to inflict great bodily harm upon more than one person." The fact that the sentencing

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[49] Id. at 243 (quoting La. Rev. Stat. Ann. § 14:30(A)(3) (West 1986); La. Code Crim. Proc. Ann., Art. 905.4(d) (West 1984)).

[50] Id. at 241-46.

[51] Id. at 246.

[52] Id. at 241-42.

[53] Id. at 245.

> jury is also required to find the existence of an aggravating circumstance in addition is no part of the constitutionally required narrowing process . . . .[54]

In Lowenfield, the five categories of first-degree murder that satisfied the narrowing function at the guilt phase also included a type of felony murder: killing a human being "[w]hen the offender has specific intent to kill or to inflict great bodily harm and is engaged in the perpetration or attempted perpetration of aggravated kidnapping, aggravated escape, aggravated arson, aggravated rape, aggravated burglary, armed robbery, or simple robbery."[55] However, a killing involving the same enumerated felonies was only second-degree murder when the offender "has no intent to kill or to inflict great bodily harm."[56]

In light of Lowenfield, two questions are relevant here. First, is Nevada's definition of capital felony murder narrow enough that no further narrowing of death eligibility is needed once the defendant is convicted? Second, if not, does the felony aggravator sufficiently narrow death eligibility to reasonably justify the imposition of a death sentence on the defendant? As we explain, the answer to the first question is no. As for the second, although the felony aggravator is somewhat narrower than felony murder generally, we conclude that the aggravator does not provide sufficient narrowing to satisfy constitutional requirements.

Nevada's statute defines felony murder broadly. Under NRS 200.030(1)(b), felony murder is one "[c]ommitted in the perpetration or attempted perpetration of sexual assault, kidnapping, arson, robbery, burglary, invasion of the home, sexual abuse of a child, sexual molestation of a child under the age of

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[54] Id. at 246.

[55] Id. at 242 (quoting La. Rev. Stat. Ann. § 14:30(A)(1)) (emphasis added).

[56] Id. at 241 n.5 (quoting La. Rev. Stat. Ann. § 14:30.1(2)).

14 years or child abuse." In Nevada, all felony murder is first-degree murder,[57] and all first-degree murder is potentially capital murder. This is much broader, for example, than Louisiana's capital felony-murder statute in Lowenfield.[58] Nevada's statute enumerates two more predicate felonies and some of the predicate felonies are multiple, e.g., either degree of kidnapping in Nevada but only "aggravated kidnapping" in Louisiana. More important though, capital felony murder in Louisiana requires specific intent to kill or to inflict great bodily harm, whereas felony murder in Nevada requires no such intent. In Nevada, the intent simply to commit the underlying felony is "transferred to supply the malice necessary to characterize the death a murder."[59]

Indeed, Nevada's current definition of felony murder is broader than the definition in 1972 when Furman v. Georcia[60] temporarily ended executions in the United States. NRS 200.030(1) then provided in pertinent part that murder "committed in the perpetration, or attempt to perpetrate, any arson, rape, robbery or burglary, . . . shall be deemed murder of the first degree."[61] To these four predicate felonies formerly

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[57] We will not delve into a court-made exception to this statement. More than 20 years ago, this court recognized a "second-degree felony murder" involving homicides committed without specific intent to kill in the course of a limited number of life-endangering felonies not included within NRS 200.030(1)(b). See Sheriff v. Morris, 99 Nev. 109, 113-18,659 P.2d 852,856-59 (1983).

[58] Our discussion of Louisiana statutes refers only to the statutory scheme addressed by the Supreme Court in Lowenfield. We have not considered any possible changes to that scheme since Lowenfield.

[59] Ford v. State, 99 Nev. 209, 215, 660 P.2d 992,995 (1983).

[60] 408 U.S. 238.

[61] 1967 Nev. Stat., ch. 523, § 438, at 1470. NRS 200.030(3) provided that death was a potential penalty for all first-degree murder. Id.

enumerated, NRS 200.030(1)(b) now adds kidnapping and four other felonies. So it is clear that Nevada's definition of felony murder does not afford constitutional narrowing. As Professor Richard Rosen points out: "At a bare minimum, then, a narrowing device must identify a more restrictive and more culpable class of first degree murder defendants than the pre-Furman capital homicide class."[62]

Because Nevada defines capital felony murder broadly, its capital sentencing scheme must narrow death eligibility in the penalty phase by the jury's finding of aggravating circumstances. We must decide whether the felony aggravator set forth in NRS 200.033(4) adequately performs this narrowing function for felony murder.

NRS 200.033(4) provides that first-degree murder is aggravated if it was committed while the defendant was engaged in

> the commission of, or an attempt to commit or flight after committing or attempting to commit, any robbery, arson in the first degree, burglary, invasion of the home or kidnapping in the first degree, and the person charged:
>
> (a) Killed or attempted to kill the person murdered; or
>
> (b) Knew or had reason to know that life would be taken or lethal force used.

As stated above, first-degree felony murder is based on "the perpetration or attempted perpetration of sexual assault, kidnapping, arson, robbery, burglary, invasion of the home, sexual abuse of a child, sexual molestation of a child under the age of 14 years or child abuse."[63]

The felony aggravator set forth in NRS

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[62] Richard A. Rosen, Felony Murder and the Eighth Amendment Jurisprudence of Death, 31 B.C.L. Rev. 1103, 1124 (1990).

[63] NRS 200.030(1)(b).

200.033(4) is somewhat narrower than felony murder in two ways. First, the felony aggravator statute enumerates five felonies, while felony murder can be based on nine felonies. And the aggravator applies only to kidnapping and arson in the first degree, while felony murder can be based on either degree of kidnapping or arson. However, although the felony aggravator does not apply to sexual assault or sexual abuse of a child[64] (both bases for felony murder), another aggravator under NRS 200.033(13) largely covers these offenses in the form of "nonconsensual sexual penetration." As discussed below, the problem of inadequate narrowing applies to this sexual-penetration aggravator with even more force than to the felony aggravator. The rest of our discussion will therefore refer to both the felony aggravator, NRS 200.033(4), and the sexual-penetration aggravator, NRS 200.033(13). Second, the felony aggravator applies only to cases where the defendant "[k]illed or attempted to kill" the victim or "[k]new or had reason to know that life would be taken or lethal force used." This adds an element not strictly required for felony murder. The sexual-penetration aggravator, however, does not add this element.

The question is, in a case of felony murder does either of these two aggravators "genuinely narrow the class of persons eligible for the death penalty and . . . reasonably justify the imposition of a more severe sentence on the defendant compared to others found guilty of murder"?[65] We conclude that the narrowing capacity of the aggravators is largely theoretical.

First, though the felony aggravator and the sexual-penetration aggravator reach four fewer felonies than does felony murder, the seven felonies reached (sexual assault, sexual abuse of a child, first-degree arson, burglary, invasion of the home, first-degree kidnapping, and particularly robbery) are much more

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[64] See NRS 432B.100 (defining "sexual abuse"); NRS 200.030(6)(d).

[65] Zant, 462 U.S. at 877.

likely to involve death than are the felonies not covered (sexual molestation of a child under the age of 14 years, child abuse, second-degree arson, and second-degree kidnapping).[66] So, in practical terms, these two aggravators still cover the vast majority of felony murders.

Next, though the felony aggravator, unlike felony murder, requires that the defendant "[k]illed or attempted to kill" the victim or "knew or had reason to know that life would be taken or lethal force used," this required element does little more than state the minimum constitutional requirement to impose death for felony murder. The emphasized language of the aggravator is actually slightly broader than that in Enmund v. Florida, where the Supreme Court concluded that the Eighth Amendment does not permit imposition of the death penalty on a defendant "who aids and abets a felony in the course of which a murder is committed by others but who does not himself kill, attempt to kill, or intend that a killing take place or that lethal force will be employed."[67] But the Court itself later broadened the standard slightly, holding that "major participation in the felony committed, combined with reckless indifference to human life, is sufficient to satisfy the Enmund culpability requirement."[68] Still, this element of the felony aggravator largely mirrors the constitutional standard

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[66] See NRS 200.030(6)(b), (c) (defining "child abuse" and "sexual molestation").

[67] 458 U.S. 782, 797 (1982) (emphasis added). Although not the intent of the felony-aggravator statute (or Enmund), if the defendant killed the victim during a felony, the plain language of the statute requires no jury finding of intent or knowledge on the part of the defendant in order to impose death. But it is still possible that such a killing could be accidental. Jurors should be instructed that even if the defendant killed the victim, they must still find that the defendant intended to kill or at least knew or should have known that a killing would take place or lethal force would be applied.

[68] Tison v. Arizona, 481 U.S. 137, 158 (1987).

and does little to narrow the class of death-eligible defendants.[69] By comparison, the definition of capital felony murder in Lowenfield which accomplished the necessary constitutional narrowing required "specific intent to kill or to inflict great bodily harm."[70]

Another problem is that this added element can be overlooked and may not even receive consideration by the jury. This case is an example. The jury was instructed:

> The following are circumstances applicable in this case by which murder of the first degree may be aggravated:
>
> 1. The murder of Brian Lee Pierce was committed by Robert Lee McConnell while engaged in the commission of a robbery.
>
> 2. The murder of Brian Lee Pierce was committed by Robert Lee McConnell while engaged in the commission of a burglary.
>
> 3. The murder of Brian Lee Pierce involved mutilation of the victim.

(Instruction no. 8.) The jury was not informed that any further element needed to be found in regard to the two felony aggravators. But this omission had no prejudicial effect in this case since there is no dispute that McConnell intentionally killed Pierce; nor has McConnell raised this issue.

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[69] Cf. Middlebrooks, 840 S.W.2d at 345 ("[S]ince the absence of reckless indifference constitutionally immunizes a defendant from the death penalty, its presence cannot meaningfully further narrow the class of death-eligible defendants."); Rosen, supra note 62, at 1130 (same). But see Perry, 871 F.2d at 1393 & n.5 (concluding that an Arkansas statute, which in relevant part defines capital murder as causing death in the course of an enumerated felony "under circumstances manifesting extreme indifference to the value of human life," constitutionally narrows death eligibility (quoting Ark. Stat. Ann. § 41-1501(1))).

[70] 484 U.S. at 242 (quoting La. Rev. Stat. Ann. § 14:30(A)(1)) (emphasis added).

We conclude that although the felony aggravator of NRS 200.033(4) can theoretically eliminate death eligibility in a few cases of felony murder, the practical effect is so slight that the felony aggravator fails to genuinely narrow the death eligibility of felony murderers and reasonably justify imposing death on all defendants to whom it applies. This conclusion applies even more forcefully to the sexual-penetration aggravator of NRS 200.033(13). We therefore deem it impermissible under the United States and Nevada Constitutions to base an aggravating circumstance in a capital prosecution on the felony upon which a felony murder is predicated.

This decision has no effect in a case where the State relies solely on a theory of deliberate, premeditated murder to gain a conviction of first-degree murder; it can then use appropriate felonies associated with the murder as aggravators. But in cases where the State bases a first-degree murder conviction in whole or part on felony murder, to seek a death sentence the State will have to prove an aggravator other than one based on the felony murder's predicate felony. (Even absent this consideration, judicious charging of felony murder should be the rule in any case.[71]) We advise the State, therefore, that if it charges alternative theories of first-degree murder intending to seek a death sentence, jurors in the guilt phase should receive a special verdict form that allows them to indicate whether they find first-degree murder based on deliberation and premeditation, felony murder, or both. Without the return of such a form showing that the jury did not rely on felony murder to find first-degree murder, the State cannot use aggravators based on

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[71] As we have stated before, the felony-murder doctrine is widely criticized: "the weight of authority calls for restricting" the doctrine, and "the trend has been to limit its applicability." Collman, 116 Nev. at 717, 7 P.3d at 445 (citing Model Penal Code and Commentaries § 210.2 cmt. 6 at 29-42 (Official Draft and Revised Comments 1980); Wayne R. LaFave & Austin W. Scott, Jr., Criminal Law § 7.5, at 622-23, 632, 640-41 (2d ed. 1986)).

felonies which could support the felony murder.

We further prohibit the State from selecting among multiple felonies that occur during "an indivisible course of conduct having one principal criminal purpose"[72] and using one to establish felony murder and another to support an aggravating circumstance. For example, in a case like this one, the burglary could not be used to establish first-degree felony murder while the associated robbery was used as an aggravator to support a death sentence. The burglary and robbery both occurred in an indivisible course of conduct whose primary purpose was the murder of Pierce.

This does not mean that it was improper for the State to allege two aggravators based on robbery and burglary rather than one, as McConnell argues without citing any supporting authority. We have repeatedly held that robbery and burglary occurring in a single course of conduct can be charged as separate aggravators.[73] We do not alter this precedent, though we reject extending it to permit the State to base a felony murder on one felony and then base an aggravator on an associated felony. Whether burglary and robbery are described as two aggravators or one should not unduly influence jurors, who should be clearly instructed that "the weighing of aggravating and mitigating circumstances is not a simplistic, mathematical process" and in no way depends on the sheer number of either.[74]

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[72] People v. Harris, 679 P.2d 433, 449 (Cal. 1984), rejected by People v. Proctor, 842 P.2d 1100, 1129-30 (Cal. 1992). In 1992, we declined to follow Harris, which prohibited the use of multiple felonies occurring during "an indivisible course of conduct" to support separate aggravating circumstances. Hornick v. State, 108 Nev. 127, 137-38, 825 P.2d 600, 607 (1992). Our precedent in this regard does not change, as the continuing discussion indicates.

[73] See,e.g., Homick, 108 Nev. at 137-38, 825 P.2d at 607.

[74] See State v. Haberstroh, 119 Nev. 173, 184, 69 P.3d 676, 683 (2003).

McConnell also contends that Nevada's death penalty statutes fail to constitutionally narrow death eligibility because the statutory aggravating circumstances in NRS 200.033 are so numerous and because NRS 175.552(3) permits unlimited aggravating evidence beyond the statutory aggravating circumstances. We hold to our precedent rejecting similar general challenges to Nevada's capital sentencing scheme.[75]

The sufficiency of the evidence of mutilation

McConnell also argues that the evidence was insufficient to support the aggravating circumstance of mutilation under NRS 200.033(8). Consistent with this court's caselaw,[76] the jury was instructed:

> "Mutilate" means to cut off or permanently destroy a limb or essential part of the body or to cut off or alter radically so as to make imperfect.
>
> In order for mutilation to be found as an aggravating circumstance, there must be mutilation of the victim beyond the act of killing.

(Instruction no. 12.) This court has also explained that the intent of NRS 200.033(8) is to discourage desecration of the body of a fellow human being.[77]

The prosecutor argued to the jury that mutilation resulted when McConnell dug into Pierce's body with a knife and then plunged the knife into it. The record shows that these actions went beyond the act of killing and caused serious abuse that altered radically Pierce's torso or abdomen, which is an essential part of the

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[75] See, e.g., Rhyne v. State, 118 Nev. 1, 14, 38 P.3d 163, 171-72 (2002); Servin v. State, 117 Nev. 775, 785-86, 32 P.3d 1277, 1285 (2001); Middleton v. State, 114 Nev. 1089, 1116-17, 968 P.2d 296, 314-15 (1998).

[76] See Vanisi v. State, 117 Nev. 330, 342, 22 P.3d 1164, 1172 (2001).

[77] Byford, 116 Nev. at 241, 994 P.2d at 717.

body. Desecration is also apparent in McConnell's callous, disrespectful treatment of the body. We conclude that the evidence was sufficient to support the jury's finding of the aggravating circumstance.

The sufficiency of the notice of the State's case in aggravation

Next, McConnell complains that the State argued facts in support of an aggravating circumstance without giving him required notice. The State filed a Notice of Intent to Seek Death Penalty which alleged among other things that the murder was committed during the course of a burglary. The State alleged that the burglary occurred when McConnell entered the victim's home with the intent to kill. In closing argument, however, the prosecutor argued that the burglary occurred based not only on McConnell's intent to kill but also his intent to rob and to commit sexual assault. McConnell says that this violated SCR 250 and deprived him of his right to due process as well as other constitutional rights.

SCR 250(4)(c) requires the State, within 30 days after filing an information or indictment, to file a notice of intent to seek the death penalty: "The notice must allege all aggravating circumstances which the state intends to prove and allege with specificity the facts on which the state will rely to prove each aggravating circumstance." And SCR 250(4)(f) requires the State to file, no later than 15 days before trial, a notice of evidence in aggravation "summariz[ing] the evidence which the state intends to introduce at the penalty phase of trial . . . and identify[ing] the witnesses, documents, or other means by which the evidence will be introduced." The State filed notice under this latter provision of the rule as well.

McConnell did not object to the State's argument and is therefore required to demonstrate that it constituted a plain error affecting his substantial rights.[78] Although the State may have technically

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[78] See NRS 178.602; Gallego, 117 Nev. at 365, 23 P.3d at 239.

violated SCR 250(4)(c) by arguing theories of intent for the burglary that went beyond the one set forth in the notice of intent to seek death, McConnell has not shown that any error was plain. More important, he has not shown the slightest prejudice, let alone an effect on his substantial rights. The evidence for the burglary was overwhelming, and McConnell does not argue that one did not occur. Nor does he argue that the State introduced or relied on any facts at the penalty phase for which he had no notice.

The propriety of various jury instructions

McConnell claims that the district court failed to instruct the jury properly on three issues. He did not object to any of the instructions or propose any different instructions, so he is again required to demonstrate plain error affecting his substantial rights.[79]

He first complains that the district court gave the jury no guidance to distinguish evidence relevant to aggravating circumstances from the other evidence presented against him. He does not specify what form this guidance should have taken. The jury was correctly instructed under our caselaw[80] regarding the proper use of evidence presented at a capital penalty hearing. (Instruction no. 20.) McConnell fails to show that any error occurred here.

Second, he claims that the district court failed to instruct the jury that life in prison without parole means exactly that and that his sentence could not be commuted if he received life without parole. This claim is baseless. The jury was instructed: "Life imprisonment without the possibility of parole means exactly what it says, that the Defendant shall not be eligible for parole." (Instruction no: 19.)

Finally, McConnell claims that the district court failed to instruct the jury that because of the deadly weapon enhancement he would not be eligible for parole

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[79] Id.

[80] Evans, 117 Nev. at 635-36, 28 P.3d at 516-17.

for at least 40 years if given a sentence allowing parole. Since the jury returned a verdict of death and not life in prison without parole, we do not see how McConnell could have been prejudiced. Regardless, the jurors were adequately informed. Instruction no. 19 informed them that a sentence allowing parole "does not mean that the Defendant would be paroled after 20 years but only that the Defendant would be eligible for parole after that period of time," and the verdict forms further informed them that either sentence allowing parole would include a second equal and consecutive prison term for the use of a firearm.

Mandatory statutory review of the death penalty

NRS 177.055(2) requires this court to review every death sentence and consider:

> (c) Whether the evidence supports the finding of an aggravating circumstance or circumstances;
>
> (d) Whether the sentence of death was imposed under the influence of passion, prejudice or any arbitrary factor; and
>
> (e) Whether the sentence of death is excessive, considering both the crime and the defendant.

In regard to the first question, the evidence supported the three aggravating circumstances. McConnell does not dispute the sufficiency of the evidence for the two felony aggravators, and the evidence of mutilation, as discussed above, was sufficient.

McConnell asserts that his death sentence is excessive and resulted from passion and prejudice because he had no significant prior criminal history and the jury was improperly exposed to inflammatory evidence. He specifically cites as improper the evidence that he said he wanted to cut Pierce's head off after the murder, that he phoned Pierce's family saying that their son died like a coward, and that he drew offensive images and wrote offensive comments on Pierce's image. As discussed above, this evidence was

admissible, and the jury was properly instructed on its use. We discern no indication that the death sentence was imposed under the influence of passion, prejudice, or any arbitrary factor.

McConnell committed this murder with a shocking degree of deliberation and premeditation and without any comprehensible provocation. He presented no compelling mitigating evidence. We conclude that considering McConnell and his crime, the sentence of death is not excessive.

CONCLUSION

We affirm the judgment of conviction and sentence of death. We also hold that a felony may not be used both to establish first-degree murder and to aggravate the murder to capital status. The interpretation of our death penalty statutes that we now embrace will provide a more certain framework within which prosecutors statewide may exercise their very important discretion in these matters, and will provide greater certainty and fairness of application within the trial, appellate, and federal court systems.

s/Shearing, C.J.
Shearing

s/Rose, J.
Rose

s/Maupin, J.
Maupin

s/Gibbons, J.
Gibbons

s/Douglas, J.
Douglas

BECKER, J., concurring in result only:

I agree with the decision of the court to affirm McConnell's conviction. I also agree that the court needs to consider the validity of Nevada's death penalty scheme in light of Lowenfield v. Phelps,[1] the changes in Nevada's statutes that have occurred since our decision in Petrocelli v. State,[2] and recent reconsideration of death penalty case law by the United States Supreme Court.[3]

However, in light of the sixteen-year period that has passed since Lowenfield, I would still have set this matter for oral argument, despite the State's failure to address Lowenfield, and I also believe the court should have requested amicus briefing. For these reasons I concur only in the result.

s/Becker _____, J.
Becker

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[1] 484 U.S. 231 (1988).

[2] 101 Nev. 46, 692 P.2d 503 (1985), holding modified on other grounds by Sonner v. State, 114 Nev. 321, 327, 955 P.2d 673, 677 (1998).

[3] See Ring v. Arizona, 536 U.S. 584 (2002).

APPENDIX C

IN THE SUPREME COURT OF THE STATE OF NEVADA

ROBERT LEE MCCONNELL, Appellant,
vs.
THE STATE OF NEVADA, Respondent.

No. 42101

Filed: March 24, 2005

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Petition for rehearing of McConnell v. State, 120 Nev. ___, 102 P.3d 606 (2004), affirming a judgment of conviction of first-degree murder and sentence of death. Second Judicial District Court, Washoe County; Steven R. Kosach, Judge.

Petition denied.

Michael R. Specchio, Public Defender, and Cheryl D. Bond, Deputy Public Defender, Washoe County, for Appellant.

Brian Sandoval, Attorney General, Carson City; Richard A. Gammick, District Attorney, and Terrence P. McCarthy, Deputy District Attorney, Washoe County, for Respondent.

David J. Roger, District Attorney, and Steven S; Owens, Chief Deputy District Attorney, Clark County, for Amicus Curiae State of Nevada.

Philip J. Kohn, Public Defender, Clark County; Franny A. Forsman, Federal Public Defender, and Michael L. Pescetta, Assistant Federal Public Defender, Las Vegas; and JoNell Thomas, Las Vegas, for Amicus Curiae Nevada Attorneys for Criminal Justice.

BEFORE THE COURT EN BANC.[1]

OPINION

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[1] This appeal was submitted for decision before January 1, 2005. Only those justices remaining on the court who participated in the original decision participated in the decision on rehearing.

PER CURIAM:

Late last year in McConnell v. State,[2] this court affirmed appellant Robert Lee McConnell's judgment of conviction of first-degree murder and sentence of death. The State, however, seeks rehearing, challenging our holding that "a felony may not be used both to establish first-degree murder and to aggravate the murder to capital status."[3] The Clark County District Attorney ("amicus") has filed an amicus brief in support of the State's position. At our direction, McConnell filed an answer to the rehearing petition, and the Nevada Attorneys for Criminal Justice also filed an amicus brief, opposing rehearing. We conclude that the State fails to demonstrate that this court overlooked or misapprehended any material points of law or fact, so we deny the petition.

NRAP 40(a)(1) requires a petition for rehearing to "state briefly and with particularity the points of law or fact which in the opinion of the petitioner the court has overlooked or misapprehended." NRAP 40(c)(1) provides: "Matters presented in the briefs and oral arguments may not be reargued in the petition for rehearing, and no point may be raised for the first time on rehearing." Under NRAP 40(c)(2), this court may consider rehearing "[w]hen the court has overlooked or misapprehended a material fact in the record or a material question of law" or "has overlooked, misapplied or failed to consider a statute, procedural rule, regulation or decision directly controlling a dispositive issue in the case."

Counsel for the State in this matter asserts that McConnell never raised the issue of the propriety of using an underlying felony as an aggravating circumstance in a felony murder and that this court acted unfairly in deciding the issue without notice to the State. He also complains that this court's opinion "falsely besmirched" his reputation, particularly by indicating that his "failure to respond to the

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[2] 120 Nev. ___, 102 P.3d 606 (2004).

[3] Id. at ___, 102P.3d at 627.

non-existent argument somehow contributed" to the court's disposal of this appeal without oral argument.[4] Counsel, however, is wrong.

First, as page 3 of the State's own petition for rehearing reflects, the table of contents to McConnell's opening brief expressly lists as argument VIII (A): "Burglary aggravator was improper because it alleged entry with intent to murder, based upon the underlying murder and the single act should not be allowed to count as the underlying offense and as an enhancing offense." Second, McConnell's opening brief at pages 48 and 49 specifically urges that the penalty was improperly enhanced to death based upon improper use of the felony murder aggravator and relies in large part upon the concurring opinion in our 2002 decision in Leslie v. Warden,[5] quoting it as follows:

> To meet constitutional muster, a capital sentencing scheme "must genuinely narrow the class of persons eligible for the death penalty and must reasonably justify the imposition of a more severe sentence on the defendant compared to others found guilty of murder." In upholding the use of underlying felonies to aggravate felony murders, this court has never addressed Lowenfield v. Phelps, [484 U.S. 231 (1988),] a United States Supreme Court case that has important implications for this issue. Under Lowenfield, an aggravating circumstance can be identical to an element of the capital murder itself as long as the state statute defines capital murder narrowly enough to begin with. However, when a state broadly defines

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[4] See id. at ___ n.36, 102 P.3d at 620 n.36 ("The State's failure to address this issue contributed to our decision not to conduct oral argument in this case.").

[5] 118 Nev. 773, 784-86, 59 P.3d 440, 448-49 (2002) (Maupin, J., concurring).

> capital offenses, the narrowing must occur through the jury's finding of aggravating circumstances at the penalty phase. Nevada broadly defines capital offenses, particularly felony murder. Thus, the required narrowing must occur through the jury's finding of aggravating circumstances.
>
> The question is, does the felony aggravator set forth in NRS 200.033(4) genuinely narrow the death eligibility of felony murderers? First, compared to the felony basis for felony murder, NRS 200.033(4) limits somewhat the felonies that serve to aggravate a murder. But the felonies it" includes are those most likely to underlie felony murder in the first place. Second, the aggravator applies only if the defendant "[k]illed or attempted to kill" the victim or "[k]new or had reason to know that life would be taken or lethal force used." This is narrower than felony murder, which in Nevada requires only the intent to commit the underlying felony. This notwithstanding, it is quite arguable that Nevada's felony murder aggravator, standing alone as a basis for seeking the death penalty, fails to genuinely narrow the death eligibility of felony murderers in Nevada.[6]

Counsel for the State also claims that he was wrongly criticized for not responding to the Supreme Court decision in Lowenfield when McConnell "never made a single mention" of that case. Counsel is again mistaken. The above quotation from Leslie in McConnell's brief clearly mentions and argues Lowenfield. In point of fact, the concurrence in Leslie, relied upon at length by McConnell, encouraged the parties to litigate the issue of narrowing on remand of that case and, by implication, invited the bench and bar

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[6] Id. at 784-85, 59 P .3d at 448-49 (footnotes omitted).

generally to reconsider the issue. That McConnell chose to do so and the State did not does not mean that the issue was not framed in this appeal. It was, and we properly undertook to reach it.[7]

Furthermore, we observe that this court's examination of this state's death penalty scheme does not stand alone. The United States Supreme Court itself has in recent years reexamined its own precedent and redirected the national debate over the death penalty, placing this field of jurisprudence in transition in many respects.[8]

Counsel further incorrectly asserts that our opinion made "no mention of the State Constitution" and is based only on federal law. McConnell explicitly relied on the Nevada Constitution in addition to federal law: "We therefore deem it impermissible under the United States and Nevada Constitutions to base an aggravating circumstance in a capital prosecution on the felony upon which a felony murder is predicated."[9] And we specifically identified the provisions of the Nevada Constitution that independently require aggravating circumstances to narrow death eligibility: "Nevada's own constitutional bans against the infliction of 'cruel or unusual punishments' and the deprivation

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[7] We have not in any respect attempted to "besmirch" counsel's reputation. We recognize his long service to his community and the Washoe County District Attorney's Office and his most distinguished record as an advocate before this court.

[8] E.g., Roper v. Simmons, __ U.S. __, 125 S. Ct. 1183 (2005) (holding that the Eighth Amendment's prohibition of cruel and unusual punishment precludes the execution of offenders who were under 18 years of age when their crimes were committed); Ring v. Arizona, 536 U.S. 584 (2002) (holding that a capital sentencing scheme under which a 'judge determines aggravating circumstances violates the Sixth Amendment right to a jury trial); Atkins v. Virginia, 536 U.S. 304 (2002) (holding that the Eighth Amendment precludes the execution of the mentally retarded).

[9] McConnell, 120 Nev. at __, 102 P.3d at 624.

of life 'without due process of law.'"[10]

The rehearing petition and the brief by amicus also fail to show that we overlooked or misapprehended any material points of law or fact in regard to the substance of our decision in McConnell.

Amicus first points out accurately that McConnell did not address whether the ruling regarding felony aggravators is retroactive, but we did not overlook this issue. Before deciding retroactivity, we prefer to await the appropriate post-conviction case that presents and briefs the issue. Amicus also informs us that it is currently prosecuting several cases that were remanded for new penalty hearings and claims that "it is impossible to know at this point whether the application of the felony aggravator at the new penalty hearing is permissible under the Court's ruling." This question, which is distinct from retroactivity in post-conviction collateral proceedings, is hardly impossible to answer. Our case law makes clear that new rules of criminal law or procedure apply to convictions which are not final.[11]

The State and amicus claim that McConnell conflicts with Schad v. Arizona,[12] where a majority of the Supreme Court agreed that Arizona's defining first-degree murder as either premeditated or felony murder without requiring a jury to agree unanimously on either theory in order to convict did not violate due process. But our opinion does not require jurors to agree on one theory to convict a defendant of first-degree murder. We simply advised the State that if it charges alternative theories of first-degree murder and seeks a death

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[10] Id. at __ & n.46, 102 P.3d at 621 & n.46.

[11] See Clem v. State, 119 Nev. 615, 627-28, 81 P.3d 521, 530-31 (2003); see also Griffith v. Kentucky, 479 U.S. 314, 321 n.6 (1987) (stating that a conviction becomes final when judgment has been entered, the availability of appeal has been exhausted, and a petition for certiorari to the Supreme Court has been denied or the time for such a petition has expired).

[12] 501 U.S. 624, 630-45 (1991) (plurality opinion); id. at 648-52 (Scalia, J., concurring).

sentence, jurors should receive a special verdict form that allows them to indicate what theory they base any murder conviction on. "Without the return of such a form showing that the jury did not rely on felony murder to find first-degree murder, the State cannot use aggravators based on felonies which could support the felony murder."[13] Amicus further argues: "If premeditation and felony murder have been held to constitute the same mens rea element, then it is contrary to reason that the felony aggravator narrows one theory of first-degree murder and not the other." Amicus implies, inaccurately, that premeditation and felony murder are identical. As this court has explained, "the commission of a felony and premeditation are merely alternative means of establishing the single mens rea element of first degree murder."[14] Thus, they are different ways of satisfying a single element. It is therefore not "contrary to reason" to recognize that when felony murder is used both to satisfy that element and to establish an aggravating circumstance, the required narrowing process may not be accomplished.

Citing Schad, the State also inquires what should be done "if all of the charged theories have been proved, or if the jury is split regarding the theory of liability." McConnell makes clear that if one or more jurors decide to convict based only on a finding of felony murder, then prosecutors cannot use the underlying felony as an aggravator in the penalty phase.[15] The opinion does not expressly address whether use of a felony aggravator is precluded if the jurors find unanimously that a murder was deliberate and premeditated but also find that it was felony murder. It is not a ground for rehearing that this issue remains for resolution in a case which

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[13] McConnell, 120 Nev. at ___, 102 P.3d at 624.

[14] Holmes v. State, 114 Nev. 1357, 1363-64, 972 P.2d 337, 341 (1998)(citing Schad, 501 U.S. at 637, for the same proposition under Arizona law).

[15] McConnell, 120 Nev. at ___, 102 P.3d at 624.

squarely presents it.

Amicus next claims that this court misconstrued the narrowing requirement of Zant v. Stephens[16] and applied an incorrect standard. However, amicus quotes Supreme Court caselaw dealing with vagueness and overbreadth issues and disregards the specific question decided by McConnell and the Supreme Court decision germane to that question, Lowenfield v. Phelps.[17] Amicus suggests that we should have decided this case based on consideration of Nevada's capital sentencing scheme in its entirety. We disagree. The pertinent issue in this case is whether felony aggravators constitutionally narrow death eligibility in a felony murder, not whether the statutory scheme in the abstract can withstand a general constitutional challenge.[18]

Amicus argues next that this court misconstrued the authority relied on in McConnell First, amicus distinguishes two decisions from other jurisdictions which we cited, State v. Middlebrooks[19] and Engberg v. Meyer,[20] both of which deemed the use of the felony in a felony murder as an aggravator to be improper. Amicus fails, however, to point out any misapprehension by this court. Our opinion did not rely on the two decisions; it simply cited them and others as examples of the varied decisions by other courts on this issue.[21] Amicus nevertheless argues that the aggravators at issue in Middlebrooks and Engberg were

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[16] 462 U.S. 862, 877 (1983).

[17] 484 U.S. 231, 241-46 (1988).

[18] Cf. McConnell, 120 Nev. at __, 102 P.3d at 625 ("We hold to our precedent rejecting. . . general challenges to Nevada's capital sentencing scheme.").

[19] 840 S.W.2d 317, 341-47 (Tenn. 1992), superseded by statute as stated in State v. Stout, 46 S.W.3d 689, 705-06 (Tenn. 2001).

[20] 820 P.2d 70, 86-92 (Wyo. 1991).

[21] McConnell, 120 Nev. at __ n.42, 102 P.3d at 620 n.42.

identical with felony murder, whereas in Nevada the felony aggravator is narrower than felony murder. This still reveals no misapprehension; our opinion recognized and discussed the narrowing effect of Nevada's felony aggravator but concluded that the effect was too slight to satisfy either the United States or the Nevada Constitution.[22]

Amicus also asserts that we misconstrued and misapplied Lowenfield because in that case the Supreme Court concluded that a felony may be used as both an element of felony murder and a felony aggravator while we reached the "opposite conclusion." This simplistic analysis is of no value. McConnell expressly recognized that under Lowenfield it is possible for an element of capital murder to serve also as an aggravator–if the definition of capital murder is sufficiently narrow to begin with.[23] Thus, we asked, "is Nevada's definition of capital felony murder narrow enough that no further narrowing of death eligibility is needed once the defendant is convicted?"[24] The answer is no, as we concluded.[25]

But amicus also takes issue with this conclusion and accuses this court of stating, in "conclusory fashion," that Nevada's definition of felony murder does not provide constitutional narrowing. According to amicus, "[i]t remains unknown why the Court has decided to simply count the number of felonies contained within the first-degree felony murder statute and conclude that it is too broad." Our opinion, however, explained why felony murder in Nevada requires further narrowing, and we did not simply count the number of felonies in the statute. We noted that under Lowenfield there are two ways a regime of capital punishment can constitutionally narrow death

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[22] Id. at __, 102 P.3d at 623-24.

[23] Id. at __, 102 P.3d at 621.

[24] Id. at __, 102 P.3d at 621.

[25] Id. at __, 102 P.3d at 622.

eligibility: a legislature may provide a sufficiently narrow definition of capital offenses, or a legislature may more broadly define such offenses and provide for narrowing at the penalty phase by a jury's finding of aggravating circumstances.[26] We then made clear why Nevada's regime falls in the latter category. We pointed out that Nevada defines first-degree felony murder more broadly than does the Louisiana statute discussed in Lowenfield; most important, the offense in Nevada requires no specific intent to kill or to inflict great bodily harm, as does the Louisiana offense.[27] We further pointed out that Nevada's definition of felony murder is broader than that set forth in the death penalty statute extant in 1972 when the Supreme Court temporarily ended executions in the United States.[28] Consequently, felony murder in Nevada is so broadly defined that further narrowing of death eligibility by the finding of aggravating circumstances is necessary.[29] Amicus fails to address this analysis, let alone show that it is in error.

> Amicus also claims that without any citations for support the Court concluded that the narrowing capacity of the felony aggravators is theoretical and in practical terms, the aggravators cover the vast majority of first-degree felony murders. Further, the Court stated that the second half of the felony aggravator statute can be overlooked and may not receive consideration by the jury. Such statements by the Court are conclusory, speculative and without support.

Although implying disagreement with our conclusion in

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[26] Id. at __, 102 P.3d at 621.

[27] Id. at __, 102 P.3d at 622.

[28] Id. at __, 102 P.3d at 622.

[29] Id. at __, 102 P.3d at 622.

McConnell that the felony and sexual-penetration aggravators encompass the vast majority of felony murders,[30] amicus does not identify any weakness in our reasoning or provide any data to contradict it. And we unassailably supported our concern that juries may overlook "the second half of the felony aggravator,"—that is, the intent element—by pointing out that in the penalty phase of this very case the jury was not instructed on the required intent and therefore gave it no consideration.[31]

Amicus is correct that a defendant in Nevada becomes death eligible only after two steps: a finding that at least one aggravator exists and a finding that the mitigating evidence does not outweigh any aggravator or aggravators.[32] McConnell did not discuss the second step, and therefore amicus says this court failed to discern that the capital sentencing scheme as a whole sufficiently narrows death eligibility. The potential effect of mitigating evidence does not provide the required narrowing. In effect, amicus advances the novel and unsound argument that an aggravator that fails to constitutionally narrow death eligibility is of no concern because of the possibility that a jury may not return a death sentence due to mitigating circumstances.

Finally, amicus asserts that the weight of authority is against this court's application of Lowenfield and cites four decisions from other jurisdictions.[33] Amicus does not indicate how the decisions–which considered Arkansas, Delaware, and Florida statutes–reveal any material misapprehension

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[30] Id. at __,102 P.3d at 623.

[31] Id. at __,102 P.3d at 624.

[32] NRS 175.554(3); Hollaway v. State, 116 Nev. 732, 745, 6 P.3d 987, 996 (2000).

[33] Deputy v. Taylor, 19 F.3d 1485, 1500-02 (3d Cir. 1994); Johnson v. Dugger, 932 F.2d 1360, 1368-70 (11th Cir. 1991); Perry v. Lockhart, 871 F.2d 1384, 1392-93 (8th Cir. 1989); Ferguson v. State, 642 A.2d 772, 780-81 (Del. 1994).

by this court in this case. We actually cited three of these decisions in McConnell and noted that they deemed the use of the felony in a felony murder as an aggravator to be proper.[34] The essential point that amicus overlooks is that the analysis and result in this case are dependent on the pertinent Nevada statutes.

Because no grounds for rehearing have been presented, we deny the State's petition.

s/Becker, C. J.
Becker

s/Rose, J.
Rose

s/Maupin, J.
Maupin

s/Gibbons, J.
Gibbons

s/Douglas, J.
Douglas

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[34] McConnell, 120 Nev. at __ n.42, 102 P.3d at 620 n.42.

APPENDIX D

Nev. Rev. Stat. Section 200.030 Degrees of murder; penalties.

1. Murder of the first degree is murder which is:

(a) Perpetrated by means of poison, lying in wait or torture, or by any other kind of willful, deliberate and premeditated killing;

(b) Committed in the perpetration or attempted perpetration of sexual assault, kidnapping, arson, robbery, burglary, invasion of the home, sexual abuse of a child, sexual molestation of a child under the age of 14 years, child abuse or abuse of an older person or vulnerable person pursuant to NRS 200.5099;

(c) Committed to avoid or prevent the lawful arrest of any person by a peace officer or to effect the escape of any person from legal custody;

(d) Committed on the property of a public or private school, at an activity sponsored by a public or private school or on a school bus while the bus was engaged in its official duties by a person who intended to create a great risk of death or substantial bodily harm to more than one person by means of a weapon, device or course of action that would normally be hazardous to the lives of more than one person; or

(e) Committed in the perpetration or attempted perpetration of an act of terrorism.

2. Murder of the second degree is all other kinds of murder.

3. The jury before whom any person indicted for murder is tried shall, if they find him guilty thereof, designate by their verdict whether he is guilty of murder of the first or second degree.

4. A person convicted of murder of the first degree is guilty of a category A felony and shall be punished:

(a) By death, only if one or more aggravating circumstances are found and any mitigating circumstance or circumstances which are found do not outweigh the aggravating circumstance or circumstances, unless a court has made a finding pursuant to NRS 174.098 that the defendant is a person with mental retardation and has stricken the notice of intent to seek the death penalty; or

(b) By imprisonment in the state prison:

(1) For life without the possibility of parole;

(2) For life with the possibility of parole, with eligibility for parole beginning when a minimum of 20 years has been served; or

(3) For a definite term of 50 years, with eligibility for parole beginning when a minimum of 20 years has been served.

A determination of whether aggravating circumstances exist is not necessary to fix the penalty at imprisonment for life with or without the possibility of parole.

5. A person convicted of murder of the second degree is guilty of a category A felony and shall be punished by imprisonment in the state prison:

(a) For life with the possibility of parole, with eligibility for parole beginning when a minimum of 10 years has been served; or

(b) For a definite term of 25 years, with eligibility for parole beginning when a minimum of 10 years has been served.

6. As used in this section:

(a) "Act of terrorism" has the meaning ascribed to it in NRS 202.4415;

(b) "Child abuse" means physical injury of a nonaccidental nature to a child under the age of 18 years;

(c) "School bus" has the meaning ascribed to it in NRS 483.160;

(d) "Sexual abuse of a child" means any of the acts described in NRS 432B.100; and

(e) "Sexual molestation" means any willful and lewd or lascivious act, other than acts constituting the crime of sexual assault, upon or with the body, or any part or member thereof, of a child under the age of 14 years, with the intent of arousing, appealing to, or gratifying the lust, passions or sexual desires of the perpetrator or of the child.

[1911 C&P § 121; A 1915, 67; 1919, 468; 1947, 302; 1943 NCL § 10068]—(NRS A 1957, 330; 1959, 781; 1960, 399; 1961, 235, 486; 1967, 467, 1470; 1973, 1803; 1975, 1586; 1977, 864, 1541, 1627; 1989, 865, 1451;

1995, 257, 1181; 1999, 1335; 2003, 770, 2944; 2007, 74)

EXHIBIT E

Nev. Rev. Stat. Section 200.033 Circumstances aggravating first degree murder. The only circumstances by which murder of the first degree may be aggravated are:

1. The murder was committed by a person under sentence of imprisonment.

2. The murder was committed by a person who, at any time before a penalty hearing is conducted for the murder pursuant to NRS 175.552, is or has been convicted of:

(a) Another murder and the provisions of subsection 12 do not otherwise apply to that other murder; or

(b) A felony involving the use or threat of violence to the person of another and the provisions of subsection 4 do not otherwise apply to that felony.

For the purposes of this subsection, a person shall be deemed to have been convicted at the time the jury verdict of guilt is rendered or upon pronouncement of guilt by a judge or judges sitting without a jury.

3. The murder was committed by a person who knowingly created a great risk of death to more than one person by means of a weapon, device or course of action which would normally be hazardous to the lives of more than one person.

4. The murder was committed while the person was engaged, alone or with others, in the commission of, or an attempt to commit or flight after committing or attempting to commit, any robbery, arson in the first degree, burglary, invasion of the home or kidnapping in the first degree, and the person charged:

(a) Killed or attempted to kill the person murdered; or

(b) Knew or had reason to know that life would be taken or lethal force used.

5. The murder was committed to avoid or prevent a lawful arrest or to effect an escape from custody.

6. The murder was committed by a person, for himself or another, to receive money or any other thing of monetary value.

7. The murder was committed upon a peace officer or

firefighter who was killed while engaged in the performance of his official duty or because of an act performed in his official capacity, and the defendant knew or reasonably should have known that the victim was a peace officer or firefighter. For the purposes of this subsection, "peace officer" means:

(a) An employee of the Department of Corrections who does not exercise general control over offenders imprisoned within the institutions and facilities of the Department, but whose normal duties require him to come into contact with those offenders when carrying out the duties prescribed by the Director of the Department.

(b) Any person upon whom some or all of the powers of a peace officer are conferred pursuant to NRS 289.150 to 289.360, inclusive, when carrying out those powers.

8. The murder involved torture or the mutilation of the victim.

9. The murder was committed upon one or more persons at random and without apparent motive.

10. The murder was committed upon a person less than 14 years of age.

11. The murder was committed upon a person because of the actual or perceived race, color, religion, national origin, physical or mental disability or sexual orientation of that person.

12. The defendant has, in the immediate proceeding, been convicted of more than one offense of murder in the first or second degree. For the purposes of this subsection, a person shall be deemed to have been convicted of a murder at the time the jury verdict of guilt is rendered or upon pronouncement of guilt by a judge or judges sitting without a jury.

13. The person, alone or with others, subjected or attempted to subject the victim of the murder to nonconsensual sexual penetration immediately before, during or immediately after the commission of the murder. For the purposes of this subsection:

(a) "Nonconsensual" means against the victim's will or under conditions in which the person knows or reasonably should know that the victim is mentally or physically incapable of resisting, consenting or

understanding the nature of his conduct, including, but not limited to, conditions in which the person knows or reasonably should know that the victim is dead.

(b) "Sexual penetration" means cunnilingus, fellatio or any intrusion, however slight, of any part of the victim's body or any object manipulated or inserted by a person, alone or with others, into the genital or anal openings of the body of the victim, whether or not the victim is alive. The term includes, but is not limited to, anal intercourse and sexual intercourse in what would be its ordinary meaning.

14. The murder was committed on the property of a public or private school, at an activity sponsored by a public or private school or on a school bus while the bus was engaged in its official duties by a person who intended to create a great risk of death or substantial bodily harm to more than one person by means of a weapon, device or course of action that would normally be hazardous to the lives of more than one person. For the purposes of this subsection, "school bus" has the meaning ascribed to it in NRS 483.160.

15. The murder was committed with the intent to commit, cause, aid, further or conceal an act of terrorism. For the purposes of this subsection, "act of terrorism" has the meaning ascribed to it in NRS 202.4415.

(Added to NRS by 1977, 1542; A 1981, 521, 2011; 1983, 286; 1985, 1979; 1989, 1451; 1993, 76; 1995, 2, 138, 1490, 2705; 1997, 1293; 1999, 1336; 2001 Special Session, 229; 2003, 2945; 2005, 317)